No. 91-1695

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PIONEER INVESTMENT SERVICES, COMPANY,
Petitioner,

—VS.—

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, AND WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Respondents, claimants in Petitioner's chapter 11 case, received actual notice of the deadline fixed by the bankruptcy court for filing proofs of claim (the "Bar Date") at least three (3) months before the expiration of the Bar Date. Respondents retained experienced bankruptcy counsel and provided him with a complete copy of their file on Petitioner's chapter 11 case, including the written notice of the Bar Date, at least one and one-half (1 1/2) months before the expiration of the Bar Date. Respondents did not file their proofs of claim and they did not file a motion for an extension of time within which to do so before the expiration of the Bar Date. Twenty (20) days after the expiration of the Bar Date, Respondents filed a motion to extend the time to file their proofs of claim. Respondents' claimed that

their failure to timely file their proofs of claim was the result of excusable neglect. Respondents' claim of excusable neglect was based solely on the ground that their bankruptcy counsel had experienced a disruption in his practice, as a result of his withdrawal from his then firm, and that his file on Petitioner's chapter 11 case was unavailable to him. The questions presented are:

1. Whether the interpretation of excusable neglect, that the failure to timely perform was due to circumstances beyond the reasonable control of the party, which has been adopted and applied by the majority of the circuit courts of appeals, should be established by this Court as the proper interpretation of excusable neglect under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure.

2. Whether the interpretation of excu-

sable neglect adopted by the United States Court of Appeals for the Sixth Circuit, which represents the minority view and considers factors other than the Respondents' actions and the reasons for those actions, is the appropriate interpretation to be used in determining whether Respondents established excusable neglect, within the meaning of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, for failing to timely file their proofs of claim;

3. Regardless of which of the two definitions of excusable neglect is applied, whether Respondents established excusable neglect, under either definition, within the meaning of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, to allow them to file their proofs of claim after the expiration of the Bar Date, where the uncontroverted facts established that

Respondents' failure to timely file their proofs of claim resulted solely from the negligence of their bankruptcy counsel and his indifference to the Bar Date.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Sixth Circuit are listed in the caption.

CORPORATE PARTY'S AFFILIATION

Petitioner has no parent companies, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

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No. _____

SUPREME COURT OF THE UNITED STATES
October Term, 1991

PIONEER INVESTMENT SERVICES COMPANY,

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vs.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, AND WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,

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OPINIONS BELOW

The opinion of the court of appeals (App.A, infra, 1a-11a) is reported at 943 F. 2d 674. The opinions of the district court (App. B and App. D. infra, 1b-20b; 1d-24d) are not reported. The opinion of the bankruptcy court, after remand from the district court, (App.C, infra, 1c-27c) is not reported. The

original opinion of the Bankruptcy Court (App. E, infra, 1e-39e) is reported at 106 B.R.510. The order of the Court of Appeals denying Petitioner's petition for rehearing appears in Appendix F.

JURISDICTION

The judgment of the Court of Appeals (App. A. infra, 1a-11a) was entered On September 6, 1991. A timely petition for rehearing and timely suggestion for rehearing in banc was denied on October 28, 1991 (Appendix F, infra, 1f). This petition for certiorari is being filed within the prescribed period of ninety (90) days after October 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1111 of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2579, codified at 11 U.S.C. §1111(a), pro-

vides:

> "A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated."

2. Rule 2002 of the Federal Rules of Bankruptcy Procedure provides, in pertinent part:

> "Except as provided in subdivisions (h), (i) and (l) of this rule, the Clerk or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of
>
> * * * * * *
>
> (8) the time fixed for filing proofs of claims pursuant to Rule 3003(c)"

3. Rule 3003(c)(2) and (3) provide:

> "(2) any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; and creditor who fails to

do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) the court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4)."

4. Rule 9006(b)(1) provides:

"except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or order of the court, the court for cause shown may at any time in its discretion (1) with or without motion or notice or the period enlarged if the request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

STATEMENT OF THE CASE

On April 12, 1989, Pioneer filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code and a list of its twenty largest unsecured creditors. This list included all of the Respondents except Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"). Pioneer sought and obtained from the Bankruptcy Court an extension of time through May 17, 1989, within which to file its schedules of assets and liabilities and statement of financial affairs.

On April 13, 1989, the clerk of the bankruptcy court mailed a Notice for a Meeting of Creditors to interested parties. This notice set May 5, 1989, as the date for the meeting of creditors required by 11 U.S.C. §341 and fixed August 3, 1989, as the Bar Date for unsecured creditors, which Respondents were, to file proofs of claim. The notice provided, in pertinent part:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. §1111 and Bankruptcy Rule 3003.

Bar Date is August 3, 1989

The first meeting of creditors actually was held on May 19, 1989, and it was adjourned. On May 18, 1989, Pioneer filed its statement of financial affairs and schedules of assets and liabilities. Respondents were not listed on the original schedules. On May 25, 1989, Pioneer amended its schedules to include all of the Respondents except Ft. Oglethorpe. Ft. Oglethorpe was not listed and the other Respondents' claims were listed as disputed, contingent and unliquidated.

On June 5, 1989, the United State Trustee appointed the Chapter 11 Creditors Committee. One of the Respondents, Clinton Associates Limited Partnership ("Clinton"), was a member of the committee from its inception.

Mark A. Berlin ("Berlin") an experienced businessman, attorney and certified public accountant, was the president of Robriste

Enterprises, Inc., the corporate general partner of all Respondents except Ft. Oglethorpe, and he was the president of Pudding Enterprises, Inc., the corporate general partner of Ft. Oglethorpe. Prior to May 5, 1989, Berlin received and read the April 13, 1989 Notice for a Meeting of Creditors.

On June 16, 1989, the adjourned first meeting of creditors was held. Berlin appeared on behalf of all of the Respondents just as he had at the May 19, 1989 meeting of creditors. Marc Richards ("Richards"), who was retained by all of the Respondents in mid-June, 1989, also appeared on behalf of all of the Respondents at the June 16, 1989 meeting.

Richards was an experienced bankruptcy attorney. At the time Respondents retained him, Berlin provided Richards with a complete copy of Respondents' file on Pioneer's chapter 11 case. The file contained the April 13,

1989 Notice for a Meeting of Creditors. Berlin retained a copy of the documents provided to Richards. Richards reviewed Respondents' file pripr to the June 16, 1989 meeting of creditors.

Respondents did not file their proofs of claim before the August 3, 1989 Bar Date. On August 23, 1989, twenty (20) days after the expiration of the Bar Date, Respondents filed a motion to extend the time to file their proofs of claim.

Respondents claimed, in their motion, that their failure to timely file their proofs of claim was the result of excusable neglect. Respondents made only one argument, which focused on their actions and the reasons for those actions, to support their claim. Respondents argument was that Richards had experienced a disruption in his practice in late July, 1989, as a result of his withdrawal from

his then firm, and that his file was unavailable to him. Neither Respondents nor Richards explained why Richards simply did not request from Berlin a copy of the duplicate file maintained by Berlin.

After an evidentiary hearing, the bankruptcy court held that Respondents had failed to prove excusable neglect within the meaning of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure ("Rule 9006(b)(1)"), and denied Respondents' motion. The bankruptcy court, relying on the decision of the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") in In re South Atlantic Financial Corp., 767 F.2d 814 (11th Cir. 1985), cert. den., sub. nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp., 475 U.S. 1015 (1986), held that, in order to establish excusable neglect, Respondents had to prove that

their failure to timely file their proofs of claim was due to circumstances beyond their reasonable control (App. E, infra 18e-28e). The bankruptcy court, relying on the decisions of the United States Court of Appeals for the Third Circuit (the "Third Circuit") in In re Vertientes, 845 F.2d 57 (3rd Cir. 1988); of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") in Maressa v. A.H. Robins Co., 839 F.2d 220 (4th Cir. 1988); and, by analogy, of this Court in Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988); held that an extension of time under Rule 9006 (b)(1) could not be granted for equitable reasons such as no prejudice to the debtor and lack of impact on efficient court administration (App. E., infra 30e-36e).

On the initial appeal to the district court, the district court reversed holding that the more liberal interpretation of excu-

sable neglect, as enunciated by the Ninth Circuit Bankruptcy Appellate Panel in In re Dix, 95 B.R. 134 (9th Cir. B.A.P. 1988), should apply in determining whether Respondents had proved that their failure to timely file their proofs of claim was the result of excusable neglect. (App. D, infra, 14d-18d). The district court remanded the case to the bankruptcy court for reconsideration of Respondents motion under the more liberal interpretation of excusable neglect, cautioning that the decision of the bankruptcy court would be reversed only for an abuse of discretion. (App. D, infra, 21d).

On remand, the bankruptcy court applied the undisputed facts of the case to the Dix factors and, again, concluded that Respondents had failed to prove excusable neglect. (App. C, infra, 1c-27c). The bankruptcy court found that the delay would not prejudice Pioneer,

that the length of the delay would not adversely impact efficient court administration, and that Respondents had acted in good faith (App. C, infra, 13c-20c). However, the bankruptcy court found that the delay was not beyond the reasonable control of the Respondents and that it was appropriate to penalize Respondents for Richards' neglect (App. C., infra, 15c-19c. Finally, the bankruptcy court found that Respondents' failure to timely file their proofs of claim resulted strongly from Richards' negligence, but also from his indifference to the Bar Date. (App. C, infra, 21c).

The bankruptcy court, after making these findings of fact, concluded that more weight must be accorded to the facts found against the Respondents, stating "For this Court to hold that the partnerships' late-filed claims are to be allowed as timely filed, notwithstanding that both the partnerships and their

attorney had actual knowledge of the August 3, 1989 claims' bar date and ample time to file proofs of claims, would render nugatory the fixing of the claims' bar date in this case." (App. C, infra, 22c).

The bankruptcy court, on the issue of whether Respondents should be penalized for Richards' negligence, distinguished the facts of this case from the facts of the Dix case. In Dix, unlike this case, the creditor did not have actual knowledge of the bar date prior to its expiration (App. C, infra, 17c). Also, and perhaps more importantly, the attorney, whose negligence was sought to be attributed to the claimant in Dix, was the attorney for the debtor, not the claimant. In re Dix, 95 B.R. 134, 139 (9th Cir. B.A.P. 1988).

On Respondents' second appeal to the district court, the district court affirmed (App. B, infra 1b-20b). The District Court

held that none of the bankruptcy court's findings of fact were erroneous and that the bankruptcy court's conclusion "was one legitimately within the discretion accorded to the bankruptcy court." (App, B, infra, 11b).

On appeal, the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") reversed the decision of the district court, affirming the decision of the bankruptcy court, denying Respondents leave to file their proofs of claim out of time (App. A, infra, 1a-11a). The Sixth Circuit agreed with the district court's conclusion that the more liberal interpretation of excusable neglect, as stated in Dix, should be applied, holding that "..., we believe the Dix factors should be applied as aids for case-by-case adjudication, rather than a necessary or complete list of the factors to be considered (App. A., infra, 8a).

However, the Sixth Circuit disagreed with the district court's conclusion that the bankruptcy court did not abuse its discretion in denying Respondents' motion to file their proofs of claim after the expiration of the bar date. The Sixth Circuit rested its decision squarely on its conclusion that "it [the Bankruptcy Court] inappropriately penalized the plaintiffs [Respondents] for the errors of their counsel." (App. A, infra, 9a). The Sixth Circuit, solely on the basis of this conclusion, then determined that four of the five Dix factors weighed in favor of the Respondents. (App. A, infra, 11a). The Sixth Circuit also held that allowing the Respondents to file their claims late would result in no prejudice to Petitioner (App. A, infra, 11a).

On September 20, 1991, Petitioner timely filed its motion for rehearing and its sugges-

tion for rehearing in banc. Pioneer argued that the Sixth Circuit's decision, adopting the more liberal interpretation of excusable neglect, as stated in Dix, clearly conflicted with the decision of the Eleventh Circuit in South Atlantic, and that its consideration of equitable factors, such as no prejudice to the debtor, was in clear conflict with the decisions of the Third Circuit in Veritentes, the Fourth Circuit in Maressa, and the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") in In re Robintech, Inc., 863 F.2d 393 (5th Cir. 1989). cert. denied sub nom., Bullock v. Oppenheim, Appel, Dixon & Co., _____ U.S. _____ (1989).

Pioneer also argued that the Sixth Circuit's decision, finding that the bankruptcy court inappropriately penalized Respondents for the errors of their counsel, was, as a matter of law, in direct conflict with the

decision of this Court in Link v. Wabash Railroad Company, 370 U.S. 626 (1962), reh. den 371 U.S. 873 (1962). In Link, this Court held that a party could not avoid the consequences of the acts or omissions of its attorney because "any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Id. at 633-634.

Pioneer also pointed out to the Sixth Circuit that the facts of this case clearly were distinguishable from the facts in the Dix case. The critical distinction between the Dix case and this case is that the attorney, whose negligence was sought to be attributed to the claimant, was not the attorney for the claimant-he was the attorney for the debtor.

Understandably, the court in Dix held that the claimant should not be penalized for the neglect of the debtor's attorney. Here, however, Richards was not the attorney for the debtor, he was the attorney for the Respondents. Accordingly, it was appropriate, as the bankruptcy court and the district court found, to penalize Respondents for Richards' negligence.

On October 28, 1991, the Sixth Circuit denied Pioneer's motion for rehearing and suggestion for rehearing in banc.

REASONS FOR GRANTING THE PETITION

This case presents three compelling reasons for granting the Petition For a Writ of Certiorari. These reasons, which are addressed below seriatim, are: (i) the decision of the Sixth Circuit is in clear and direct conflict with the decision of another circuit court of appeals on the issue of the correct

interpretation of the term excusable neglect in Rule 9006 and with the decisions of five other circuit court of appeal on the issue of whether equitable factors are relevant in determining such a motion; (ii) the Sixth Circuit has decided an important question of federal law, i.e. the interpretation of the term excusable neglect under Rule 9006(b)(1), in conflict with decisions of other circuit courts of Appeals, which question has not been, but should be, settled by this Court, because there should be a uniform interpretation of this Rule applicable to all cases, regardless of the circuit in which the case is filed; and (iii) the Sixth Circuit has decided a federal question, i.e. whether a party in litigation in federal court may avoid the consequences of the negligence of its counsel, in a way that directly conflicts with an applicable decision of this Court.

I. THE DECISION BELOW CONFLICTS WITH PRIOR JUDICIAL INTERPRETATION OF "EXCUSABLE NEGLECT" AND FACTORS RELEVANT TO MAKING SUCH A DETERMINATION, INCLUDING DECISIONS OF THE SECOND, THIRD, FOURTH, FIFTH AND ELEVENTH CIRCUITS

The decision of the Sixth Circuit in this case is in clear and direct conflict with the decision of the Eleventh Circuit in In re South Atlantic Financial Corporation, 767 Fed. 2d. 814 (11th Cir. 1985), cert. den. sub nom., Biscayne 21 Condominium Association v. South Atlantic Financial Corporation, 475 U.S. 1015 (1986) on the issue of the interpretation of the term excusable neglect in Rule 9006(b)(1). In the South Atlantic case, the Eleventh Circuit interpreted excusable neglect under Rule 9006(b)(1), as requiring the movant to show that "the failure to timely perform a duty was due to circumstances which were beyond a reasonable control of the person whose duty it was to perform." 767 F. 2d. at 817. In this

case, the Sixth Circuit declined to adopt the Eleventh Circuit's interpretation of excusable neglect and, instead, adopted what it characterized as "a more textured approach, relying upon the five part test adopted by the Ninth Circuit Bankruptcy Appellate Panel in Dix.

The decision of the Sixth Circuit in this case, to the extent that it considers relevant factors other than the actions of the claimant and the reasons for those actions, also is in direct conflict with the decision of the Eleventh Circuit in the South Atlantic case. In South Atlantic, the Eleventh Circuit determined, from the plain language of Rule 9006(b)(1), that the focus of the rule is on the claimant's actions and the reasons for those actions, not on the effect that an extension might have on the other parties' positions. 767 F. 2d. at 818-19. In this case, the Sixth Circuit considered and, in part, based its

decision on one such factor, i.e. no prejudice to the debtor.

Moreover, the decision of the Sixth Circuit is in clear and direct conflict with the decisions of other circuit courts of appeals to the extent it considers prejudice to the debtor, or any other equitable considerations. See, Hoos & Co v. Dynamics Corporation of America, 570 F. 2d. 433, 439 (2nd Cir. 1978) ("This clear Congressional intent to require filing of valid proofs of claim within the established time limits that it has set is sufficient to preclude us from finding exceptions to those rules in the supposed interest of equity"); Maressa v. A.H. Robins, 839 F. 2d. 220, 221 (4th Cir. 1988) ("The clear Congressional intent to require filing of valid proofs of claim within the established time limits precludes any exceptions based on general equitable principles. While

the effects of the bar date appear harsh, any other result would undermine the clear purpose of the Bankruptcy Rules."); In re Vertientes. Ltd., 845 F. 2d 57, 60 (3rd Cir. 1988) ("The court has no discretion to grant and extension simply because no prejudice would result, or for any other equitable reason."); In re Robintech, Inc., 863 F. 2d 393 (5th Cir. 1989), cert. den. sub nom., Bullock v. Oppenheim, Appel, Dixon & Co., _____ U.S. _____, (1989) ("Moreover, because such procedures are thought to be necessary to protect the bankrupt and creditors, exceptions cannot be made every time a creditor claims hardship.")

Thus, the decision of the Sixth Circuit, considering, as it does, factors such as no prejudice to debtor and other equitable considerations, clearly conflicts with the decisions of five other circuit courts of appeals.

As Petitioner argues below in more detail, the decision of the Sixth Circuit also is in clear conflict with Congressional intent, as derived from the plain language of the Bankruptcy Code and the Bankruptcy Rules, which intent requires the filing of valid proofs of claim within the established time limits.

Finally, the decision of the Sixth Circuit in this case, to the extent that it holds that mere inadvertence, oversight or neglect of counsel is sufficient to establish excusable neglect under Rule 9006, is in clear and direct conflict with the decision of the Eleventh Circuit in the South Atlantic case. This decision also is in clear and direct conflict with the decisions of other circuit courts of appeal interpreting Rule 6(b)(2) of the Federal Rules of Civil Procedure, ("Rule 6(b)(2)") which Rule also allows untimely

filings upon a showing of excusable neglect. McLaughlin v. City of LaGrange, 662 F. 2d 1385 (11th Cir. 1981), cert. den., 456 U.S. 979 (1982); Graham v. Pennsylvania Railroad, 342 F. 2d 914 (D.C. Cir. 1964), cert. den., 381 U.S. 904 (1965); Davidson v. Keenan, 740 F. 2d 129 (2d Cir. 1984). Indeed, the decision of the Sixth Circuit appears to conflict with the decision of this Court in Lujan v. National Wildlife Federation, 110 U.S. 3117 (1990) which suggests that when a party has notice and sufficient time to act, but fails to do so, the party fails to establish excusable neglect under Rule 6(b)(2), the language of which is identical to Rule 9006(b)(1).

II. THE DECISION BELOW PRESENTS AN IMPORTANT FEDERAL QUESTION WITH SIGNIFICANT IMPACT ON THESE GOALS OF CERTAINTY AND FINALITY IN CHAPTER 11 CASES WHICH CONGRESS INTENDED WHEN IT ENACTED THE BANKRUPTCY CODE AND BANKRUPTCY RULES

The Sixth Circuit has decided an impor-

tant question of federal law which has not been, but should be, settled by this Court, especially since the decision of the Sixth Circuit is in clear and direct conflict with the decisions of five other circuit courts of appeals. At issue, is the scheme established by Congress which requires the holders of claims against a chapter 11 debtor to file their claims within established time limits to promote certainty and finality.

Section 1111(a) provides, in pertinent part, "A proof of claim or interest is deemed filed under section 501 of this title...except a claim or interest that is scheduled as disputed, contingent or unliquidated." Rule 3003(c) provides, in pertinent part, "Any creditor or equity security holder whose claim or interest is not scheduled or is scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the

time prescribed by subdivision (c)(3) of this rule;..." Rule 3003(c)(3) provides, in pertinent part, "The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." Rule 2002(a)(8) provides that creditors shall be given not less than twenty days notice by mail of the time fixed for filing proofs of claim pursuant to Rule 3003(c).

Unlike the decision of the Sixth Circuit in the case, the decisions of the Second Circuit in Hoos, the Third Circuit in Vertientes, the Fourth Circuit in Maressa, the Fifth Circuit in Robintech, and the Eleventh Circuit in South Atlantic, all recognize the clear Congressional intent, as expressed by the plain language of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, to require filing of proofs of claim within the time limits set to promote certainty and finality.

To hold, as the Sixth Circuit did in this case, that bankruptcy courts must consider untimely claims whenever any sort of excuse is asserted, destroys the objectives of certainty and finality which Congress intended to promote when it enacted the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

This most important question of federal law has not been addressed by this Court and, in view of the conflict among the circuit courts of appeals, it should be. This case presents this Court with the opportunity not only to resolve a conflict among the circuits, but also to settle, once and for all, the important question of the correct interpretation of the phrase excusable neglect in Rule 9006(b)(1).

III. THE COURT OF APPEALS VIOLATED THE EXPRESS HOLDING OF THIS COURT IN LINK v. WABASH RAILROAD COMPANY BY HOLDING THAT IT WAS INAPPROPRIATE TO PENALIZE RESPONDENTS FOR THE NEGLIGENCE OF THEIR BANKRUPTCY COUNSEL

The decision of the Sixth Circuit, that a party should not be penalized for the negligence of its counsel, directly conflicts with the decision of this Court in Link v. Wabash Railroad Company, 370 U.S. 626 (1962), reh den, 371 U.S. 873 (1962).

In Link, the district court sua sponte dismissed plaintiff's diversity negligence action against the defendant. 370 U.S. at 627. The district court notified counsel for plaintiff and defendant of the scheduling of a pre-trial conference to be held on a date and time certain. Id. at 627. On the day of the pretrial conference, plaintiff's counsel did not appear. The district court dismissed the action. Id. at 628-629. The court of appeals affirmed. Id. at 629. This court, in affirming the decision of the court of appeals, affirming the district court's dismissal of the action, stated:

> "There is certainly no merit to the contention that dismissal of Petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or remissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and it considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"

Id. at 633-634.

In this case, the Sixth Circuit found "that the partnerships [Respondents] in all likelihood relied on the expertise of their experienced bankruptcy counsel and paid no further heed to the matter." (App. A. infra, 9a). This decision of the Sixth Circuit, which, in effect, holds that it is an unjust penalty on the Respondents to deny their motion to file their claims out-of-time because of Richard's negligence, is in direct

conflict with the holding of this Court in Link. Indeed, in view of decision of this Court in Link, it was not only appropriate, but also mandatory, for the bankruptcy court to penalize the Respondents for the negligence and indifference of their counsel.

The decision of the Sixth Circuit reaches a result which this Court, thirty years ago, in Link, prohibited, i.e. visiting the sins of Respondents' counsel upon the Petitioner. 370 U.S. at 634. As this Court stated in Link, if counsel's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. 370 U.S. at 634. Respondents have exercised their remedy by filing a malpractice action against Richards. To afford Respondents the additional relief, as the Sixth Circuit would do, of being able to file their proofs of claim out-of-time,

reaches a result which this Court already has said Respondents are not entitled to receive.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Craig J. Donaldson
Riker, Danzig, Scherer,
Hyland & Perretti
Attorneys for Petitioner
Pioneer Investment Services
Company

APPENDIX A

No. 90-6339

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PIONEER INVESTMENT SERVICES COMPANY,
Debtor.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, and WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,
Plaintiffs-Appellants,

v.

PIONEER INVESTMENT SERVICES COMPANY,
Defendant-Appellee.

} ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed September 6, 1991

Before: JONES and NORRIS, Circuit Judges; and JOINER, Senior District Judge.*

NATHANIEL R. JONES, Circuit Judge. Plaintiffs-appellants Brunswick Associates Ltd. ("Brunswick"), Clinton Associates Limited Partnership ("Clinton"), Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"), and West Knoxville Associates Limited Partnership ("W. Knoxville"), appeal the district court's order affirming the Bankruptcy Court's decision denying their motion for leave to file their proofs of claim out of time. For the reasons that follow, we reverse.

I.

The facts giving rise to this appeal are uncontested. On April 12, 1989, the debtor-appellee Pioneer Investment Services Company ("Pioneer") filed its voluntary petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. At the same time, Pioneer filed a list of its twenty largest unsecured creditors. This list included Brunswick, Clinton and W. Knoxville. Pioneer asked for and was granted extensions by the bankruptcy court through May 17, 1989, within which to file its statement of affairs and the relevant schedules.

On April 13, 1989, a Notice for a Meeting of Creditors was mailed by the bankruptcy court clerk's office to the parties in interest setting May 5, 1989 as the date for the creditor's meeting required under Section 341(a) of the Bankruptcy Code. This notice also fixed August 3, 1989, as the bar date for filing proofs of claim by unsecured creditors. This notice specifically provided as regards the bar date:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated,

*The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

> is unlisted or you do not agree with the amount. See 11 U.S.C. § 1111 & Bankruptcy rule 3003.
>
> Bar date is August 3, 1989.

J. App. at 175 (quoting notice). The bankruptcy court found that Mark A. Berlin, president of Robriste Enterprises, Inc., general partner of Clinton, W. Knoxville, and Brunswick, and president of Pudding Enterprises, Inc., general partner of Ft. Oglethorpe, received and read the April 13, 1989 notice. The court also found that Berlin is an experienced businessman engaged in real estate and financial management, an attorney licensed to practice in Florida and New York and a certified public accountant.

The bankruptcy court found that Berlin attended and participated in the May 5, 1989 meeting of creditors. The records to the creditor's meeting held on May 19 also indicate that Berlin entered an appearance on behalf of the partnerships.

Prior to the May 19 meeting, Pioneer filed its statement of financial affairs and the relevant schedules. The plaintiffs are not listed on the schedules as originally filed. However, on May 25, Pioneer amended its schedules to include Clinton, W. Knoxville and Brunswick as creditors holding contingent unliquidated, and disputed claims. Ft. Oglethorpe is not listed on the schedules as a creditor.

On June 5, the United States Trustee filed his "Appointment of Committee of Unsecured Creditors" designating Clinton as a member of the creditors' committee. Berlin, representing Clinton, was a member of this committee from its inception.

The plaintiffs collectively retained Marc Richards as their legal counsel. The bankruptcy court found that Richards was retained in mid-June and was an experienced bankruptcy attorney. Berlin's affidavit also suggests that Richards was provided with a complete copy of the

bankruptcy file for all the partnerships and that the file contained the above-mentioned notice for filing proofs of claim. The testimony also indicates that Richards advised Berlin that there was no bar date in the file and that therefore, filing proofs of claim was not a matter of urgency.

On August 23, 1989, twenty days after the expiration of the bar date, the plaintiffs filed their proofs of claim. The claims were signed on behalf of Clinton, W. Knoxville, and Brunswick by "Mark A. Berlin, President of Robriste Enterprises, Inc. (General Partner)." The claim filed on behalf of Ft. Oglethorpe is signed "Mark A. Berlin, President Pudding Enterprises, Incorporated (General Partner)." The plaintiffs acknowledge that they filed the proofs of claim after the bar date and that they did not file any petition for an extension of time to file such proofs of claim. However, they claimed below, and claim before this court, that the bar date for filing should have been extended as their failure to timely file was due to "excusable neglect", or, in the alternative, that their claims should be allowed *nunc pro tunc* to the bar date.

The bankruptcy court denied the plaintiffs' motion to file their claims late, finding no "excusable neglect" within the meaning of the bankruptcy rules and no reason to exercise its equity power to allow the filing of the claims *nunc pro tunc*. The plaintiffs then appealed to the district court. While the district court accepted all of the bankruptcy court's factual findings, the court found that the bankruptcy court had applied an overly strict interpretation of "excusable neglect" and the court remanded for reconsideration under a more liberal standard. On remand the bankruptcy court again found that, even under the more liberal interpretation of "excusable neglect" there was no basis for allowing the plaintiffs to file their claims out of time. The plaintiffs again appealed and the district court affirmed. This timely appeal followed.

II.

We review the factual findings of the bankruptcy court under a clearly erroneous standard. Bankr. R. 8013. Whether the court properly found that a proof of claim was filed late due to "excusable neglect" is reviewed for abuse of discretion. *In re Yoder Co.*, 758 F.2d 1114, 1117 (6th Cir. 1985).

Section 1111(a) of the Bankruptcy Code requires creditors to file a proof of claim in circumstances where a particular claim is "scheduled as disputed, contingent, or unliquidated." 11 U.S.C. § 1111(a). In this case the plaintiffs acknowledge that they were required to file a proof of claim. Bankruptcy Rule 3003(c) requires the court to set a time within which proofs of claim may be filed and authorizes the court to extend such time limit "for cause shown." Bankr. R. 3003(c)(3). It appears to be well-established that Bankruptcy Rule 3003 must be read in conjunction with Rule 9006(b), which guides courts as to how and when extensions of time may be granted. *See, e.g., In re Vertientes, Ltd.*, 845 F.2d 57, 60 (3d Cir. 1988); *In re South Atlantic Fin. Corp.*, 767 F.2d 814, 817 (11th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986); *In re Dix*, 95 B.R. 134, 137 (Bankr. 9th Cir. 1988). Rule 9006(b) provides:

> (b) Enlargement
>
> (1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act

was the result of excusable neglect.

Bankr. R. 9006(b)(1). In this case, no request for extension of time was made prior to the expiration of the bar date, therefore, the court only has discretion to extend the time for "excusable neglect." *See, In re Vertientes*, 845 F.2d at 59 (court only has discretion to grant extensions as permitted in the two circumstances outlined in Rule 9006(b)(1)).

This court has never defined "excusable neglect" as it relates to the filing of late proofs of claim. Though the question was raised in *In re Yoder*, the court decided the case on other grounds and declined to adopt either a strict or a liberal interpretation of the term. 758 F.2d at 1118 and n.4. The bankruptcy court in the instant action originally adopted the strict interpretation of "excusable neglect" following the Eleventh Circuit. Under this view, "excusable neglect" could only be found when the failure to timely perform was due to circumstances beyond the reasonable control of the party. *In re South Atlantic Fin. Corp.*, 767 F.2d at 817. Other courts have also indicated a tendency to read the procedural requirements of the Bankruptcy Rules and notices strictly in order to further the purpose of quick and effective settlement of bankrupt estates. *See, e.g., In re Robintech, Inc.*, 863 F.2d 393, 397-98 (5th Cir. 1989), *cert. denied sub nom., Bullock v. Oppenheim, Appel, Dixon & Co.*, 110 S. Ct. 55 (1989); *Maressa v. A. H. Robins Co.*, 839 F.2d 220, 221 (4th Cir. 1988); *In re Vertientes*, 845 F.2d at 60-61. Reasoning from these and other similar precedents, the bankruptcy court determined that the proper interpretation of the "excusable neglect" rule was a strict one.

On its initial review, the district court reversed, arguing that Sixth Circuit precedent interpreting rules analogous to Bankruptcy Rule 9006(b) indicated a more liberal approach to the concept of excusable neglect. For example, in *INVST Financial Group Inc. v. Chem Nuclear Systems, Inc.*, 815 F.2d 391, 397-400 (6th Cir.), *cert. denied sub nom., Garrett v. INVST Financial Group Inc.*,

484 U.S. 927 (1987), this court interpreted Fed. R. Civ. P. 60(b), which governs motions to set aside default judgments as a result of "excusable neglect." In that case, the court indicated that trial courts must examine a number of factors including prejudice to the plaintiff, the merits of the defendant's defenses and any culpable conduct on the part of the defendant in determining whether a Rule 60(b) motion satisfies the "good cause" or "excusable neglect" standards. *Id.* In addition, in *In re Winner Corporation*, 632 F.2d 658, 660-61 (6th Cir. 1980), this court reversed a district court's dismissal of a bankruptcy appeal, holding that the late filing of a designation of the record on appeal under former Bankruptcy Rule 806 would not justify dismissal of the appeal in the absence of a finding of negligence or indifference on the part of the appellant.

Reasoning from these precedents, the district court concluded that this court would likely adopt an approach similar to the approach taken by the Ninth Circuit in *In re Dix*, 95 B.R. 134 (Bankr. 9th Cir. 1988) with respect to the proper interpretation of "excusable neglect." In *Dix*, the court articulated five factors to be considered in order to determine whether a creditor satisfied Bankruptcy Rule 9006(b)'s requirement of excusable neglect:

> (1) whether granting the delay will prejudice the debtor;
>
> (2) the length of the delay and its impact on efficient court administration;
>
> (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;
>
> (4) whether the creditor acted in good faith; and
>
> (5) whether clients should be penalized for their counsel's mistake or neglect.

95 B.R. at 138. The district court also suggested that on remand the bankruptcy court should consider whether the filing of the late proofs of claim resulted from negligence, indifference or culpable conduct on the part of the moving creditors or their counsel following the standards laid out by the court in *INVST Financial Group*, 815 F.2d at 398-99.

The parties understandably are split over which approach this court should adopt with respect to the application of Rule 9006(b). We find that the district court correctly interpreted this court's precedent to suggest a more textured approach to the "excusable neglect standard." In this regard, we find the *Dix* factors to be helpful in determining when a party has failed to timely file its proof of claims based upon excusable neglect. However, we believe that the *Dix* factors should be applied as aids for case-by-case adjudication, rather than a necessary or complete list of the factors to be considered.

That said, we turn to the analysis of the bankruptcy court's decision below. Essentially, the appellants' position is that the bankruptcy court on remand did not properly apply the *Dix* factors as directed by the district court. Specifically, the appellants claim that, in the guise of applying the *Dix* factors, the court simply reasserted the strict requirement that parties may only be excused for failure to timely file if that failure was beyond the reasonable control of the party whose duty it was to file. However, we find the plaintiffs' characterization of the bankruptcy court's opinion to be inaccurate. The bankruptcy court considered each of the *Dix* factors individually on remand, and essentially based it decision on the fact that Berlin, an experienced businessman and lawyer, and Richards, an experienced bankruptcy attorney, had actual notice of the bar date and simply failed to meet it. The court further found that Richards was negligent in failing to file the proofs of claim by the bar date and that his actions indicated an indifference to the bar date and the orders of the court.

While we find that the bankruptcy court did apply the *Dix* factors as directed by the district court on remand, it inappropriately penalized the plaintiffs for the errors of their counsel. As noted by the bankruptcy court, the ultimate responsibility of filing the plaintiffs' proof of claims rested with the plaintiffs' counsel Richards. There was evidence in the record to suggest that Mr. Berlin specifically inquired with Richards about the deadline for filing the proof of claims and that Richards had told him that there was no urgency. There was no finding by the bankruptcy court that the plaintiff partnerships were guilty of negligence, bad faith or culpable conduct. In light of the fact that Richards affirmatively told Berlin that there was no urgency with regard to the filing deadline, we find that the partnerships in all likelihood relied on the expertise of their experienced bankruptcy counsel and paid no further heed to the matter.

We also find it significant that the notice containing the bar date was incorporated in a document entitled "Notice for Meeting of Creditors." Such a designation would not have put those without extensive experience in bankruptcy on notice that the date appended to the end of this notice was intended to be the final date for filing proof of claims. Official Bankruptcy Form 16 provides a model for notifying creditors of a proof of claims deadline in a Chapter 11 bankruptcy.

> The debtor [or trustee] has filed or will file a list of creditors and equity security holders pursuant to Rule 1007. Any creditor holding a listed claim which is not listed as disputed, contingent or unliquidated as to amount, may, but need not, file a proof of claim in this case. **Creditors whose claims are not listed or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim on or before *[Insert Date]*, which date is hereby fixed as the last day for filing a proof of claim[.]**

(emphasis added). While we do not suggest that the court was obligated to notify creditors in precisely this form, the comparison between this Form 16 notice and the notice actually given in this case suggests the dramatic ambiguity of the latter. This ambiguity is exacerbated by the fact that the notice was simply and inconspicuously labeled "Bar date" without any reference to its significance as a deadline for the filing of proof of claims. Even persons experienced in bankruptcy might confuse such a label for other deadlines. For example, the term "bar date" is also used to describe the deadline for filing objections to a debtor's discharge under Rule 4007(c).

The uncontroverted evidence below established that while Berlin was an experienced businessman, he had no experience or expertise in bankruptcy. Thus, even if he could be attributed with having seen the "Notice for Meeting of Creditors" he should not necessarily have been attributed with understanding the significance of the date contained therein. This factor, when taken with Richards' representations regarding the filing deadline, and the peculiar and inconspicuous placement of the bar date in a notice regarding a creditor's meeting convince us that the bankruptcy court unjustifiably punished the plaintiffs for the sins and neglect of their lawyer.

Turning back to the *Dix* factors, the bankruptcy court specifically found that there would be no prejudice to the debtor as a result of the delay in plaintiffs' filing, that the delay would not be disruptive of efficient court administration, and that there was no bad faith or culpable conduct on the part of the plaintiff partnerships. As described above, we find that the court erred in attributing the negligence of plaintiffs' attorney to the partnerships. Further, since Richard's negligence was responsible for the twenty-day delay in filing, and since the plaintiffs, through Berlin, specifically asked counsel regarding the filing deadline and were assured there was no problem, we do not find the fact that timely filing was not beyond the control of the plaintiffs to be determinative.

In sum, then, four of the five *Dix* factors weigh unequivocally in favor of the plaintiffs. Further, this court in the context of default judgments has held that absent prejudice to the plaintiff or culpable conduct on the part of the defendant, the policy of hearing claims on the merits weighs in favor of allowing the claims to go forward. *See INVST Financial Group*, 815 F.2d at 398-99. As the court put it, "Default judgments should not be used to discipline attorneys; it is the client who suffers by being deprived of his day in court." *Id.* at 400. We find the same considerations should guide us when analyzing the impact of a failure to meet a filing deadline for proof of claims if the fault is clearly attributable to the attorney, and no prejudice results to the debtor.

III.

For the aforementioned reasons, the decision of the district court affirming the bankruptcy court's decision refusing to accept the plaintiffs' late proof of claims is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
SEP 12, 1990

In re: PIONEER INVESTMENT SERVICES COMPANY, Debtor-in-Possession. BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al., Appellants, v. PIONEER INVESTMENT SERVICES COMPANY, Appellee.	)	No.CIV-3-90-0666
BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al., Appellants, v. PIONEER INVESTMENT SERVICES COMPANY Appellee.	)	NO. CIV-3-90-_____

MEMORANDUM OPINION

These are appeals from orders entered by the United States Bankruptcy Court for the Eastern District of Tennessee in the case under chapter 11 of the Bankruptcy Code of Pioneer Investment Services Company ("PISCO"). The appellants are four limited partnerships, Brunswick Associates Limited Partnership ("Brunswick"), Clinton Associates Limited Partnership ("Clinton"), Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"), and West Knoxville Associates Limited Partnership ("West Knoxville Associates").

This Court, acting on the appellants, motion, consolidated these appeals, and gave them expedited consideration. [See doc. 6 in No. CIV

3-90-0666.] The Court heard oral argument on September 5, 1990.

The earlier-filed appeal, No. CIV 3-90-0666, is from the Bankruptcy Court's June 8, 1990 decision denying the appellants' motion for leave to file their proofs of claim after the bar date. The later-filed appeal is from the Bankruptcy Court's decision, rendered on August 17, 1990, that the appellants may not participate in proceedings in PISCO's case in bankruptcy, because they are not creditors Of PISCO. [See doc. 4, collective ex. 6 in No. CIV 3-90-0666.]

The record on appeal for the later-filed appeal has not been delivered to the Clerk of this court. Furthermore, at the oral argument on September 5, 1990, counsel for Genefin S.A., another creditor of PISCO, appeared end argued that Genefin S.

A. should also be a party to this later-filed appeal, because the Bankruptcy Court's ruling on the appellants' standing to participate in proceedings in this case in bankruptcy was instigated at least in part by the motion for a protective order of Genefin S.A., seeking to Protect itself from discovery requested by the appellants for the purpose of establishing that Genefin S.A. is an insider with respect to the debtor, PISCO. Counsel for Genefin S.A. and counsel for the debtor argued that, with respect to the later-filed appeal, the appellants had failed to name in their notice of appeal the parties to the order appealed from, as is required by Bankruptcy Rule 8001 (a) and Bankruptcy Rules, Official Form No. 35.

The Court allowed the debtor to file a brief concerning this standing issue, an d allowed Genefin S .A. until Monday,

September 10, 1990 to file a brief on the same issue. In light of the current posture of the later-filed appeal, and the fact that the Court is ready to address the issue raised in the earlier-filed appeal, the Court will set aside its earlier Order consolidating these appeals, and rule in this Memorandum Opinion on the issue presented in No. CIV 1-90-0666.

The background of the earlier-filed appeal is set forth in this court's Memorandum Opinion filed on February 20, 1990 in another case arising out of the same case in bankruptcy, No. CIV 3-89-0927 in this Court. [See doc. 2, ex. A in No. CIV 3-90-0656.] After the Bankruptcy Court below first denied the appellants' motion for leave to file their proofs of claim after the bar date, this Court reversed the Bankruptcy Court's decision and remanded this contested matter to the Bankruptcy

Court for reconsideration of the appellants' motion in light of the five factors listed in In re Dix, 95 Bankr. 134 (B.A.P. 9th Cir., 1988), and also to determine whether the appellants' failure to file their proofs of claim timely resulted from negligence, indifference, or culpable conduct on the Part of the appellants or their counsel, applying INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F. 2d 391 (6th Cir.), cert. denied, sub nom. Garratt v. INVST Financial Group, Inc., 484 U.S. 927 (1987); and In re Winner Corporation, 632 F.2d 658 (6th Cir., 1980).

This Court noted in its Memorandum Opinion filed in No. CIV 3-89-0927 that "it [would] be for the Bankruptcy Court to determine how to weigh the relative importance of the various factors in this particular case and in other cases, since the determination of the presence or

absence of excusable neglect under Bankruptcy Rule 9006 (b) must be made case by case." This Court also warned the Parties that subsequent review of any decision made by the Bankruptcy Court on this issue after considering the listed factors would be according to the abuse-of-discretion standard, citing In re Dix, supra; and In re Vertientes, Ltd., 845 F.2nd 57 (3rd Cir. 1988).

In the Memorandum Opinion rendered from the bench on June 8, 1990, United States Bankruptcy Judge Richard Stair, Jr. reconsidered the appellants' motion in light of all of the factors required to be considered, assigned relative weights to those factors, and again denied appellants' motion for leave to file their proofs of clain after the bar date. The appellants have appealed from this decision in a timely manner.

The appellants have framed several issues on appeal, assigning error to the Bankruptcy Court's holding that the appellants should be penalized for the mistake or neglect of their counsel, to the Bankruptcy Court's finding that the appellants ' counsel had an indifferent attitude toward the bar date, to the Bankruptcy Court's assignment of relative weights to the factors considered by it upon remand, to the Bankruptcy Court's holding that the appellants had failed to show excusable neglect under Bankruptcy Rule 9006 (b), and to the Bankruptcy Court's denial of the appellants' motion for leave to file their proofs of claim nunc pro tunc the bar date. All of these assignments of error really state only one, that the Bankruptcy Court erred in refusing to allow the appellants to file their proofs of claim after the bar date.

Judge Stair did not make any erroneous findings of fact, and therefore this Court will not set aside any of hie findings of fact. Bankruptcy Rule 8013. In particular, this court finds Judge Stair's finding that the appellants' counsel had an indifferent attitude towards the bar date well supported by the record, since this attorney, an expert in bankruptcy matters, received copies of the notices addressed to three of the four appellants which stated the bar date in time to file proofs of claim timely, but advised the representative of his clients, the appellants, that there was nothing to worry about with respect to filing proofs of claim in the near future. Furthermore, counsel for the Parties conceded at the oral argument in No. CIV 3-89-0927 that there were no factual issues presented in that appeal. Since what the Bankruptcy

Court did upon remand was to reconsider the facts found by it earlier in light of the factors required to be considered, only the Bankruptcy Court's application of the law to the facts is presented for review in this appeal.

As this court stated in its Memorandum Opinion filed in No. CIV 3-89-0927, the Court's task in this appeal is to determine whether Judge Stair abused discretion by refusing to allow the appellants to file their proofs of claim after the bar date. The Court finds that he did not.

The appellants argue that the effect of Judge Stair's June 8, 1990 ruling was to ignore the In re Dix and INVST Financial Group factors, and to apply a stricter, beyond-reasonable-control reading of "excusable neglect" under Bankruptcy Rule

9006(b), but the less strict reading of excusable neglect mandated by this Court 's decision in No. CIV 3-89-0927 did not necessarily have to result in a reversal of the Bankruptcy Court's initial decision. Judge Stair' s conclusion in this case was one legitimately within the discretion accorded to the Bankruptcy Court, particularly in light of the evidence presented of the legal knowledge and business sophistication of the appellants' representative, Mark A. Berlin, and of the attitude of indifference shown by the appellants' then counsel, Marc E. Richards.

One remaining issue, which this Court found it unnecessary to address in deciding the appeal in No. CIV 3-89-0927, must be decided in this appeal. It is undisputed that no notice of the 11 U.S.C. ss 341 meeting of creditors stating the bar date addressed to one of the appellants,

Ft. Oglethorpe, was ever received by Ft. Oglethorpe. Ft. Oglethorpe argues that to bar it from filing a proof of claim after a deadline of which it never received formal notice deprives it of the due process guaranteed to it by the Fifth Amendment to the United States Constitution. This presents an issue of law to be considered de novo by this Court.

Some undisputed facts must be noted in deciding this constitutional issue. Mr. Berlin received three notices stating the bar date addressed to the other three appellants. Mr. Berlin was at all pertinent times the president of Pudding Enterprises, Inc., the corporate general partner of Ft. Oglethorpe. This Court noted in its Memorandum Opinion filed in No. CIV 3-89-0927 that Mr. Berlin attended the creditors' meeting in PISCO's case in bankruptcy on May 19, 1989, as the

representative of all four of the appellants. This Court also noted that counsel for the appellants conceded at the oral argument before this Court in No. CIV 3-89-0927 that Mr. Richards represented all of the appellants in the Bankruptcy Court. Therefore, in spite of the lack of formal notice to Ft. Oglethorpe, this creditor had actual notice through Mr. Berlin of the bar date, appeared in the proceedings in the Bankruptcy Court below, first by its representative and then by counsel, and participated in proceedings in this case .

These undisputed facts distinguish this case from the authorities upon which the appellants rely. In Tulsa Professional Collection Services, Inc. v Pope, 485 U.S. 478 (1988), in which the Supreme Court held that actual notice by mail, as opposed to publication notice, was required before the claim of a creditor of

a probate estate could be barred, the creditor did not have actual notice of the administration of the decedent's estate and of the bar date for filing claims against the estate.

City of New York v. New York, N.H. & R. Co., 344 U.S. 293 (1953), was decided not under the Due Process Clause, but under a provision of the Bankruptcy Act which required "reasonable notice" to creditors of a bar date for filing claims. In City of New York, there was only publication notice to the creditor, and not actual notice of the bar date. The Supreme Court held that the creditor's knowledge of the debtor's ongoing reorganization proceedings was not sufficient to put the creditor on inquiry to discover the bar date. Accord, Broomall Industries, Inc. v. Data Design Logic Systems, Inc., 786 F.2d 401 (Fed. cir. 1986) .

The decision of the court of appeals for this circuit in In re Yoder Company, 758 F.2d 401 (6th Cir. 1985), does not require reversal of Judge Stair's ruling, because the court of appeals in that case found the district court's finding that the creditor received notice of the bar date clearly erroneous.

This Court is persuaded by the reasoning in In re Terex Corporation, 45 Bankr. 290 (Bankr. N.D. Ohio 1985). In Terex Corporation, the widow of the original owner of a claim against the debtor received notice of the bar date for filing claims. The decedent's estate, of which this widow was the executrix, attempted after the bar date to file a proof of claim reflecting a wrongful death claim. It was undisputed that the estate itself was never given notice of the bar

date.

In denying the estate's motion for leave to file its proof of claim late, the Bankruptcy Court for the Northern District of Ohio distinguished City of New York, supra, and stated in part,

> [The decedent's widow] is correct that the Estate of John Szakmeister never received notice but this ie a technicality without merit. Mrs. Szakmeister is one person. The fact that, in her role as executrix of the Estate of John Szakmeister she did not receive notice, does not change the fact that she did individually receive notice.... Her unexplained failure to [file a wrongful

> death claim before the bar date] is not excused by the fact that a separate notice was not sent to her as executrix.

The appellants' argument in this appeal is that because the Bankruptcy Court did not send to Mr. Berlin a notice stating the bar date which was in exactly the same words as the other three notices received by Mr. Berlin, except addressed to Ft. Oglethorpe instead of to one of the other three appellants, Ft. Oglethorpe is entitled to disregard the bar date of which its representative, Mr. Berlin, had notice. To read the due process requirement to do nothing more than to require one more piece of paper repeating what is contained in three other pieces of paper would elevate form over substance. The Court is not

convinced that due process requires this, and so will affirm Judge Stair's denial of the motion for leave to file proofs of claim after the bar date with respect to all four appellants.

ENTER:

Leon Jordan

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
SEP 12, 1990

In re: PIONEER INVESTMENT SERVICES COMPANY, Debtor-in-Possession. BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al., Appellants, v. PIONEER INVESTMENT SERVICES COMPANY, Appellee.	)	No.CIV-3-90-0666
BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al., Appellants, v. PIONEER INVESTMENT SERVICES COMPANY Appellee.	)	NO. CIV-3-90-_____

ORDER

For the reasons stated in the Court's Memorandum Opinion filed simultaneously with this Order, the Court's previous order consolidating these two cases on appeal [doc. 6 in No. CIV 3-90-0666] is SET ASIDE. The Court will decide the issue on appeal in No. CIV 3-90-____ separately.

In No., CIV 3-90-0666, the Court rules that the Order entered by the United States Bankruptcy Court for the Eastern District of Tennessee on June 8, 1990, denying the appellants' motion for leave to file their proofs of claim after the bar date, is AFFIRMED. Bankruptcy Rule 8013.

ENTER:

Leon Jordan

United States District Judge

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 3-89-01058

PIONEER INVESTMENT SERVICES
COMPANY a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY

Debtor

O R D E R

Upon reconsideration of the motion filed August 23, 1989, by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership' and Ft. Oglethorpe Associates Limited Partnership in the manner directed by the district court in its Order filed February 20, 1990, remanding these proceedings to the Bankruptcy Court, and for the reasons set forth in this court's Memorandum

Opinion filed October 10, 1989, as supplemented by findings announced orally in open Court on June 8, 1990, the court reaffirms its order entered October 10, 1989. It is accordingly ORDERED that the motion of Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership seeking an order extending the August 3, 1989 claims bar date or, alternatively, requesting an order authorizing the filing of these claims shall be and is DENIED.

ENTER: June 8, 1990

BY THE COURT

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

MEMORANDUM OPINION

June 8, 1990

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE :

PIONEER INVESTMENT SERVICES CO.,
A/K/A PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.
Case No. 3-89-01058

BEFORE THE HONORABLE RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR THE DEBTOR:

CRAIG J. DONALDSON, ESQ.
Suite 1200
One Commerce Plaza
Nashville, Tennessee 33239

FOR FIRST NATIONAL BANK OF LOUISVILLE:

R. THOMAS STINNETT, ESQ.
700 First American Center
Knoxville, Tennessee 37902

FOR PAUL D. POWSNER:

CELESTE N. HERBERT, ESQ.
Suite 600
First Tennessee Bank Building
Knoxville, Tennessee 33902

FOR BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP:

JOHN A LUCAS, ESQ.
HOWARD E. FRASIER, JR., ESQ.
7th Floor, First Tennessee Bank Building
Knoxville, Tennessee 37902

FOR BANQUE WORMS:

M. EDWARD OWENS, JR., ESQ.
5 th floor, One Centre Square
620 Market Street
Knoxville, Tennessee 37902

FOR THE UNITED STATES TRUSTEE:

PATRICIA C . FOSTER, ESQ.
Suite 610, Plaza Tower
Knoxville, Tennessee 37929

FOR THE UNSECURED CREDITORS' COMMITTEE:

JOHN A. WALKER, JR., ESQ.
715 First American Center
Knoxville, Tennessee 37902

THE COURT: On October 10, 1989, I entered an order supported by a Memorandum Opinion denying a motion filed August 23, 1989 by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Fort Oglethorpe Associates Limited Partnership. The partnerships' motion seeks an order extending the August 3, 1989 bar date for filing proofs of claim to August 23, 1989, the date each partnership filed a proof of claim or, alternatively, requests an order authorizing the filing of each claim nunc pro tunc to the claims' bar date.

In my October 10, 1989 memorandum opinion, I relied on In re South Atlantic Financial Corporation, 767 F.2d 814, a 1985 case out of the Eleventh Circuit, and other authorities in applying a definition of

excusable neglect under Bankruptcy Rule 9006 (b) (1) which required a showing that the failure to perform a duty timely, in this instance the filing of the partnerships' proofs of claim, was due to circumstances beyond the reasonable control of the person charged with the duty. In my findings, I relied upon Sherrod v. Piedmont Aviation, Inc., 516 F. Supp. 39 at Page 41, Note 1, a 1978 District Court decision out of this district, in which Judge Neese, in construing Federal Rule of Civil Procedure 6(b), the federal rule upon which Bankruptcy Rule 9006 (b) (1) is patterned, held that excusable neglect is not shown when the failure to act is due to simple inadvertence on the part of counsel, or counsel's mistake regarding the content of the rules, or counsel's lack of familiarity with the rules. The partnership appealed my disallowing their claim.

The District Court in a memorandum opinion filed February 20, 1990 held that the findings of fact contained in my October 10, 1989 memorandum opinion were not clearly erroneous and would not be set aside. However, the District Court held that I construed the excusable neglect standard of Bankruptcy Rule 9006 (b) (1) too narrowly. Judge Jordan remanded with instructions that I reconsider the excusable neglect associated with the late filing of the partnerships' claims within the context of the liberal excusable neglect standard enunciated by the Ninth Circuit Bankruptcy Appellate Panel in In re Dix, 95 B.R. 134, a 1988 case. In Dix, the material facts were that a creditor moved to extend time to file a proof of claim two years after expiration of the bar date. The Court found that the debtor had not listed the creditor in the schedules accompanying its chapter 11 petition and

that the creditor had not known of his claim at the time of the bar date, but did learn of it about a year before he filed his motion for extension of time.

The Ninth Circuit Bankruptcy Appellate Panel, applying a liberal standard, found that the creditor had established excusable neglect. In addition, the Court listed five factors to be considered in determining whether a creditor has satisfied the excusable neglect standard under Bankruptcy Rule 9006 (b) (1). These factors are : "(1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith and (5) whether clients should be penalized for their counsel's

mistake or neglect." 95 B.R. at 138, quoting In re Magouirk, 693 F2d 948 at 951, a 1982 decision out of the United States Court of Appeals for the Ninth Circuit.

In addition to his instructions to apply the Dix excusable neglect standard, Judge Jordan in his February 20, 1990 memorandum opinion stated that "the Bankruptcy Court in applying Bankruptcy Rule 9006 (b) should find whether a failure to file a proof of claim on or before a bar date resulted from negligence, indifference or culpable conduct on the part of a moving creditor or its counsel." That quote is contained at Page 10 of Judge Jordan's February 20, 1990 memorandum opinion. He cites INVST Financial Group, Incorporated v. Chem-Nuclear Systems, Inc., 815 F2d 391 at 397 to 400 , a 1987 Sixth Circuit case, and In re Winner Corporation, 632 F.2d 658 at 660 and 61, a 1980 Sixth Circuit case in

support of those instructions.

In its instructions to this Court, the District Court stated : "It will be unnecessary for the Bankruptcy Court to make findings of fact concerning the length of the appellants' delay, whether the delay was beyond the reasonable control of the person whose duty it was to perform, whether the appellants should be penalized for their counsel's mistake or neglect, and whether the failure to file proofs of claim on or before the bar date resulted from negligence, since the Bankruptcy Court's findings of fact in Judge Stair's memorandum opinion address these issues either explicitly or implicitly." That quote is likewise found at Page 10 of Judge Jordan's memorandum opinion.

In sum, this Court, in compliance with the directives of the District Court,

is required to analyze the record before it within the context of the liberal excusable neglect standard set forth in Dix. Of the five factors enunciated by the Dix Court, findings were made in my October 10, 1990 memorandum opinion with respect to factor No. 2, as concerns the length of delay; factor No. 3, concerning whether the delay was beyond the reasonable control of the person whose duty it was to perform; and factor No. 5, relative to whether the partnerships should be penalized for their counsel's mistake or neglect.

Further, in my October 10, 1989 memorandum opinion, I also made specific findings relative to the negligence of the partnerships and their former counsel in failing to file proofs of claims prior to the August 3, 1989 bar date. I will proceed to consider the excusable neglect issue before me as it relates to the late-

filed claims of the partnerships in the manner directed by the District Court. As further instructed by the District Court, I will rely on my findings set forth in my October 10, 1989 memorandum opinion, except where additional findings are appropriate or required relative to Dix factors 1, 2, in part, and 4. My earlier findings, for the most part, will not be restated. Each of the Dix factors will be analyzed separately.

Factor No. 1: Whether granting the delay will prejudice the debtor.

With regard to the issue of prejudice, the debtor contends that if the partnerships are allowed to file their claims, it will be required to object to those claims and to engage in further and expensive litigation in defending against the claims. This argument is unpersuasive.

The allowance of the partnerships' claims would impose no duty upon the debtor beyond that which already exists. Bankruptcy Code ss 1107, with certain limitations, confers upon a debtor in possession the functions and duties imposed upon a trustee appointed in a Chapter 11 case under Bankruptcy Code ss 1106. One of these duties is to examine proofs of claims and object to the allowance of any proof of claim that is improper. See Bankruptcy Code ss 1106(a)(1).

Further, the Court takes judicial notice of the fact that the debtor's second amended plan of reorganization filed March 23, 1990, which is presently under consideration by creditors, proposes to deal with the partnerships' claims, to the extent allowed, as a Class 16 creditor. The debtor's second amended disclosure statement filed March 27, 1990, at Pages 54,

through 57 and 71, discusses the debtor's treatment of the partnerships' claims. The debtor will not be prejudiced by granting the filing of the partnerships' motion beyond the August 3, 1989 bar date. Factor No. 1 is resolved in favor of the partnerships.

Factor No. 2: The length of the delay and its impact on efficient court administration.

The bar date for filing claims was August 3, 1989. The partnerships filed their claim on August 23, 1989, 20 days beyond the bar date. Other than the time associated with litigating the partnerships' motion in the instant proceeding, the delay has had no adverse or negative impact on efficient court administration. The debtor has proceeded with the reorganization process to the

extent that an order approving the adequacy of its second amended disclosure statement was entered April 4, 1990. The solicitation process has begun and, as I have discussed, the debtor's second amended plan of reorganization is before its creditors and interest holders. This plan takes the partnerships' claims into account to the extent the respective claims may be allowed. Factor No. 2 is resolved in favor of the partnerships.

Factor No. 3: Whether the delay was beyond the reasonable control of the person whose duty it was to perform.

The court need not reiterate its findings made October 10, 1989 wherein it determined that it could not "on the record before it . . . find that the failure of the partnerships to file claims prior to expiration of the bar date were due to

circumstances . . . beyond [their] reasonable control." The Court's October 10, 1989 memorandum opinion clearly delineates its findings supporting this conclusion. The 20-day delay in filing the partnerships' claims was not beyond the reasonable control of the partnerships and/or their former attorney, Marc Richards. Factor No. 3 is resolved against the partnerships.

Factor No. 4: Whether the creditors acted in good faith.

There's nothing in the record to suggest that the partnerships or their former attorney, Marc Richards, acted other than in good faith in the filing of the partnerships' claims. Factor No. 4 is resolved in favor of the partnerships.

Factor No. 5: Whether clients

should be penalized for their counsel's mistake or neglect.

The Court made specific findings in its October 10 , 1989 memorandum opinion relating to the circumstances surrounding the late filing of the partnerships' claims. The Court observes that the Ninth Circuit Bankruptcy Appellate Panel in Dix was also confronted with a motion filed by a creditor after expiration of the claims' bar date requesting an extension of time in which to file a proof of claim. The Dix court premised its conclusion that it would be improper to penalize the creditor for its attorney's neglect exclusively on its assumption that the attorney "did not sufficiently advise the creditor of his rights and duties as a creditor of the Dix estate." See 95 B.R. at 139.

The Dix Court made no further

findings in support of its resolution of Factor No. 5 in favor of the creditor. In the instant proceeding, his Court cannot ignore the fact that Mark Berlin, President of Pudding Enterprises, Inc., the general partner of Fort Oglethorpe, and the President of Robriste Enterprises, Inc., the general partner of Clinton, West Knoxville and Brunswick, testified that he read the notice contained in the August 3, 1989 bar date upon receipt.

As I noted in my October 10, 1989 memorandum opinion, Mr. Berlin is not an unsophisticated individual when it comes to financial matters. He is engaged in the business of real estate and financial management, he is an attorney licensed to practice law in the states of Florida and New York, and he is a certified public accountant. Additionally, he is the President of the two general partners who

manage Clinton, West Knoxville, Brunswick, and Fort Oglethorpe, creditors who assert claims against the debtor in excess of $6,900,000.

This court cannot disregard the fact that Mr. Berlin and, therefore, the partnerships had actual knowledge of the August 3, 1989 claims' bar date shortly after the debtor filed its Chapter 11 petition. Under the circumstances of the instant proceeding, resolution of Factor No. 5 in the partnerships' favor would equate to a finding that notice of a claim's bar date served on a creditor, regardless of the degree of sophistication of that creditor' is ineffective where the creditor subsequently employs counsel. While it is true that the ultimate responsibility for filing the partnerships' proofs of claims falls on Mr. Richards' shoulders, the Court cannot disregard the

fact that the partnerships through Mr. Berlin were aware of the claims' bar date shortly after commencement of the bankruptcy case.

Further, Mr. Berlin has been an active participant in the debtor's Chapter 11 case, having participated in the initial and adjourned meetings of creditors, and he has been a member of the committee of Unsecured Creditors from its inception. Actual knowledge of the claims' bar date by Mr. Berlin and, therefore, the partnerships, precludes the court from finding that it would be improper to penalize the partnerships for the neglect of their attorney. The partnerships and their attorney all had actual knowledge of the August 3, 1989 claims' bar date. Factor No. 5 is resolved against the partnerships.

Did failure of the partnerships to

file a proof of claim on or before the August 3, 1989 bar date result from negligence, indifference, or culpable conduct on the part of the creditor or its counsel? Again, I made specific findings in my October 10, 1989 memorandum opinion relating to the circumstances surrounding the August 23, 1989 filing of the partnerships' proofs of claim. Those findings support the conclusion that Mr. Richards was negligent in not timely filing proofs of claims on behalf of the partnerships. To a degree, they also support the conclusion that Mr. Richards' attitude toward the bar date was one of indifference. They do not support a finding of culpable conduct on the part of the partnerships or their former counsel.

The court concludes that Factors No. 1, 2, and 4 of the Dix standard of excusable neglect, when isolated, must be

resolved in favor of the partnerships. Factors No. 3 and 5 must be resolved against the partnerships. In weighing the relative importance of each of the various factors, the Court is persuaded that under the facts of the instant proceeding Factors No. 3 and 5 must be accorded more weight than Factors No. 1, 2, and 4. Factors No. 3 and 5 go to the procedural heart of the claims' filing process -- notice. For this court to hold that the partnerships' late-filed claims are to be allowed as timely filed, notwithstanding that both the partnerships and their attorney had actual knowledge of the August 3, 1989 claims' bar date and ample time to file proofs of claim, would render nugatory the fixing of the claims' bar date in this case.

Under the extreme facts of this case, a finding that the partnerships' claims should be allowed as timely filed

would establish a precedent difficult to overcome in Chapter 11 and chapter 7 asset cases. The Chapter 11 debtor should be secure in the knowledge that the creditor holding a disputed, contingent, or unliquidated claim, who has received notice of the bar date for filing proofs of claim is required to comply with the procedural claims' filing process mandated by Bankruptcy Rule 3003(c).

Whereas, under the facts of this case the court attaches considerable importance to Dix factors 3 and 5, it attaches less importance to Factors No. 1, 2, and 4. The Court routinely fixed the August 3, 1989 claims' bar date at 90 days after the initial meeting of creditors required under Bankruptcy Code ss 341(a). On August 3, 1989, less than 120 days had elapsed since the filing of the debtor's petition. As is true in many large

Chapter 11 cases, the reorganization process at this time remained in a relative stage of infancy. It's difficult to envision circumstances where Factors No. 1 and 2, standing by themselves, would have been resolved against any creditor in the instant case holding a disputed, contingent, or unliquidated claim who sought to file a proof of claim within reasonable time after expiration of the bar date. Rarely is a delay of a few days in the filing of a claim after expiration of the bar date in a chapter 11 case, when considered by itself, going to prejudice the debtor or impact on efficient court administration. Rarely is a creditor's good faith, and the Dix court does not provide a definition of that term within the context of a late-filed claim, going to be seriously at issue with respect to a claim filed shortly after expiration of the bar date.

Certainly Factors No. 1, 2, and 4 must be considered within the context of each case. The longer the delay, the more critical these factors may become. Notice, however, goes to the very substance of the claims' filing process. The facts supporting the Ninth Circuit Bankruptcy Appellate Panel's allowance of the late-filed claim in Dix are dissimilar with the facts confronting this Court in the instant proceeding. The dissimilarity is focused on the creditors' knowledge of the existence of the claims' bar date. In Dix, the creditor was not scheduled by the debtor and was unaware of his claim prior to the expiration of the bar date. In the case before me, the partnerships, excepting Fort Oglethorpe, were scheduled by the debtor and all four partnerships, together with their former attorney, had actual knowledge of the August 3, 1989 bar date.

On balance, when considered within the context of the actual notice of the partnerships and their attorney of the claims' bar date, the relative importance of Dix Factors No. 3 and 5 clearly outweighs the importance of Factors No. 1, 2, and 4. The notice factor is pervasive in analyzing these five factors and it is very difficult to isolate the factors out and treat them separately, a problem the Dix court was not confronted with because there wasn't any notice.

It's my conclusion that the partnerships have not established excusable neglect under the standard this Court was directed to follow under the order of remand filed by the District court on February 20, 1990. My order denying the partnerships' motion entered October 10, 1989 will be reaffirmed.

This Memorandum Opinion supplements the Memorandum Opinion previously filed October 10, 1989. An appropriate order will be entered. In the event of the transcription of this opinion, the court reporter will deliver it to me, I will make such amendments and changes as I deem appropriate. I will put down an appropriate order memorializing this opinion.

FILED: June 20, 1990, nunc pro tunc to June 8, 1990

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
FEB 20, 1990

In re PIONEER INVESTMENT SERVICES COMPANY, Debtor.	)
BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP. et al.' Appellants,	)
v.	)
	No. CIV 3-89-0927
PIONEER INVESTMENT SERVICES COMPANY, Appellee.	)

MEMORANDUM OPINION

The issue on appeal in this case is whether the Bankruptcy Court erred in holding that the four appellants were barred from filing Proofs of claim in the debtor's reorganization case in bankruptcy because they missed the filing deadline,

the "bar date". The four appellants are limited partnerships, Brunswick Associates Limited Partnership ("Brunswick"), Clinton Associates Limited Partnership ("Clinton"), Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"), and West Knoxville Associates Limited Partnership ("West Knoxville"). The appellee is the debtor, Pioneer Investment Services Company ("PISCO"). United States Bankruptcy Judge Richard Stair, Jr. denied the relief sought by the appellants in a thoughtful memorandum opinion filed October 10, 1989, which appears as item No. 9 in the record on appeal. Judge Stair's findings of fact are not clearly erroneous, and therefore may not be set aside. Bankruptcy Rule 8013. Counsel for the parties agreed at oral argument before this Court that there are no factual issues presented in this appeal.

The facts reveal the following chronology. On April 12, 1989, the debtor filed its petition for relief, On April 13. the Bankruptcy Court Clerk issued a notice of the 11 U.S.C. ss 341 meeting of creditors. This notice included the following statement:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 USC Sec. 1111 & Bankruptcy Rule 3003.
> Bar date is August 3, 1989.

Three of the appellants received this notice, Ft. Oglethorpe was not sent one. The three notices were all received by Mark A. Berlin.

Mark A. Berlin was at all pertinent times the president of Pudding Enterprises, Inc, the corporate general partner of Ft. Oglethorpe, and the President of Robriste Enterprises, Inc., the corporate general Partner of the other three appellants. He attended the creditors' meeting on May 19, 1989. When the Assistant United States Trustee asked for appearances to be stated on the record, Mr. Berlin stated his name, and listed all four of the appellants. During the meeting, Mr, Berlin referred to himself as the general partner of several of these partnerships, and stated that, while he is an attorney at law, he was not the attorney for the appellants. Mr. Berlin questioned the debtor's representative, Milton A. Turner, about PISCO's dealings with all four of the appellants, and asked specifically why PISCO had not scheduled Ft. Oglethorpe as a

creditor.

The creditors' meeting was adjourned until June 19, 1989. Mr. Berlin attended this meeting, too, with Marc E. Richards, Esq. of the New York, New York law firm of Myerson & Kuhn. Mr. Richards announced that he was appearing for the appellant Clinton. On June 19, 1989, Mr. Richards filed a written notice of appearance on behalf of Clinton. However, as Judge Stair found, affidavits signed by Mr. Berlin and Mr. Richards show that Mr. Richards represented all four of the appellants in the Bankruptcy Court. Counsel for the appellants conceded at oral argument before this Court that Mr. Richards represented all of the appellants in the Bankruptcy Court.

Concerning Mr. Richards' representation of the four appellants.

Judge Stair quoted from an affidavit made by Mr. Berlin:

> [T]he Partnerships retained Mr, Richards as bankruptcy counsel in mid-June, 1989. At that time, I had [the] Partnerships' bankruptcy file reproduced and given to Mr. Richards, I also inquired as to the time for filing the Partnerships' Proofs of claim, Richards advised me that as there was no bar date, that the filing of the Partnerships' proofs of claim was not a matter of urgency.

Some time after the appellants retained him, Mr. Richards left Myerson & Kuhn to practice with another law firm, and for a time was unable to gain possession of his file concerning this representation. However, there is no evidence that he asked

Mr, Berlin for the duplicate file during this period.

The appellants did not file Proofs of claim by the August 3, 1989 bar date, even though the debtor's amended schedules do not list Ft. Oglethorpe as a creditor, and list the claims of the other three appellants as contingent, unliquidated, and disputed. On August 23, 1989, all four appellants, by Mr. Richards as their attorney, moved for an extension of time within which to file proofs of claim, or, in the alternative, to allow the filing of their proofs of claim nunc pro tunc, Mr. Berlin and Mr. Richards submitted affidavits in support of this motion, and the appellants' proofs of claim were proffered with the motion. Judge Stair's denial of this motion led to this appeal.

The appellants make four arguments

why Judge Stair's decision should be overturned. First, they argue that Judge Stair erred as a matter of law when he held that a motion for an extension of time within which to file proofs of claim filed after a bar date set by the Bankruptcy Court is governed by both the "for cause shown" language of Bankruptcy Rule 3003(c)(3), and by Bankruptcy Rule 9006(b)(1), which provides in pertinent part, " [W]hen an act is required or allowed to be done at or within a specified period. . . by order of court, the court for cause shown may at any time in its discretion. . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

Second, the appellants argue that if Rule 9008(b)(1)'s excusable neglect standard does apply, the Bankruptcy Court

erred in construing the phrase too strictly, to require a showing that the appellants' failure to file their proofs of claim on or before the bar date was due to circumstances beyond the reasonable control of the appellants or their attorney. The appellants say that this "beyond reasonable control" construction reads the word "neglect" out of the rule, since one cannot truly be said to have neglected to do what was beyond one's ability to do.

Third, the appellants argue that, no matter what the proper legal standard for considering a late motion to extend the time for filing Proofs of claim, Judge Stair abused his discretion in not allowing the extension of time or the filing nunc pro tunc under the circumstances. Fourth, Ft. Oglethorpe argues that barring its claim against PISCO in spite of the fact that no notice of the 11 U.S.C. ss 341

meeting of creditors was mailed to it denies it due process.

The appellants' first, second, and fourth arguments ask this Court to determine whether the Bankruptcy Court erred in its conclusions of law, which requires de novo consideration of these conclusions. Matter of Consolidated Bancshares, Inc., 785 F.2d 1249, 1252 (5th Cir. 1986) (citation omitted). The appellants' third argument asks this Court, after determining the rules of law properly to be applied, to determine whether Judge Stair abused his discretion in applying these rules to the facts.

This Court is convinced that Judge Stair did not err in concluding that Bankruptcy Rules 3003(c)(3) and 9006(b) must be read together in considering a motion to extend the time for filing

Proofs of claim filed after the bar date set in a chapter 11 case. In re Vertientes, 845 F.2d 57, 59, 60 (3rd Cir. 1988), and In re South Atlantic Financial Corp., 767 F.2d 814, 817 (11th Cir. 1985), cert. denied, sub nom. Biscayne 21 Condominium, Inc. v. South Atlantic Financial Corp., 475 U.S. 1015 (1986). See also Matter of Robintech, Inc. 863 F.2d 393, 297 n.2 (5th Cir.), cert. denied, sub nom. Bullock v. Oppenheim, Appel, Dixon & Co., ____ U.S. ____ [110 S. Ct. 55] (1989) (citation omitted) ("The [creditor] also could have, but failed to, ask for an extension after the bar date passed, based upon excusable neglect.") Rule 9006(b)(1) is the more specific rule, since it applies expressly to any motion for an extension of time filed "after the expiration of the specified period".

The Court of Appeals for this Circuit

has not had occasion to address this issue. However, the approach taken by Judge Stair is consistent with the practice under the former rules. See In re Yoder Company, 758 F.2d 1114, 1117-18 (6th Cir. 1985) (whether a creditor's claim was barred for late filing of his proof of claim considered under the Bankruptcy Rule 906(b) standard of excusable neglect). Many courts, including bankruptcy courts, district courts, and a bankruptcy appellate panel, have come to the same conclusion as did Judge Stair. See, for example, In re Dix, 95 Bankr. 134 (B.A.P. 9th Cir, 1988); Mackie v. Production Oil Co., 100 Bankr. 826 (N.D. Tex. 1988); In re STN Enterprises, Inc., 99 Bankr. 218 (D. Vt. 1988); In re Wolray Hotels, Inc. 99 Bankr. 480 (Bankr. M.D. Fla. 1989); and In re Jackson, 98 Bankr. 738 (Bankr. D. Md. 1986).

The question of the definition of "excusable neglect" for the purposes of the rule is precisely the one left unanswered by the Court of Appeals for this Circuit in In re Yoder Company, 758 F.2d 1114, 1117-18 and n.4 (6th Cir. 1985). Judge Stair, relying on In re South Atlantic Financial Corp., 767 F.2d 814 (11th Cir. 1985), cert. denied, sub nom. Biscayne Condominium Association, Inc. v. South Atlantic Financial Corp., 475 U.S. 1015 (1986), and other authorities, applied the definition of excusable neglect which requires a showing that the failure to perform timely a duty was due to circumstances beyond the reasonable control of the person charged with the duty. Judge Stair also relied upon Sherrod v. Piedmont Aviation, Inc., 516 F. Supp. 39, 41 n.1 (E.D. Tenn. 1978) (citation omitted), in which District Judge Neese, construing the similar provision in Fed. R. Civ. P. 6(b)(2), held that

excusable neglect is not shown when the failure to perform the duty was due to simple inadvertence on the part of counsel, or to counsel's mistake regarding the applicable procedural rules, or to counsel's unfamiliarity with the rules.

While there is respectable authority for the narrow reading of "excusable neglect", this Court believes that the Court of Appeals for this Circuit will require a more liberal approach to construing and applying the rule. In INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 397-400 (6th Cir.), cert. denied, sub nom. Garratt v. INVST Financial Group, Inc., 484 U.S. 927 (1987), the Court indicated that consideration of a Fed. R. Civ. P. 60(b) motion to set aside a default judgment requires consideration of whether the plaintiff will be prejudiced by the

granting of the motion, of whether the moving defendant has stated a meritorious defense, and of whether culpable conduct on the part of the defendant led to the default sought to be set aside. In In re Winner Corporation, 632 F.2d 658,660-61 (6th Cir. 1980), the Court reversed a district court's dismissal of a bankruptcy appeal, holding that the late filing of the designation of the record on appeal under former Bankruptcy Rule 806 would not justify dismissal of the appeal in the absence of a finding of negligence or indifference on the part of the appellant, and at least implying that a finding of bad faith is necessary to support such a dismissal.

This Court understands the importance of claims-filing deadlines in chapter 11 cases, and perceives that this importance might justify treating motions

for extensions like the one presented to the Bankruptcy Court by the appellants less generously than a Fed. R. Civ. P. 60(b) motion or a motion to extend a deadline set by Bankruptcy Rule 8006.

> The purpose of the bankruptcy laws is quickly and effectively to settle bankrupt estates... [B]ecause [bankruptcy] procedures are thought to be necessary to protect the bankrupt and the creditors, exceptions cannot be made every time a creditor claims hardship. . . . Frequent players in the bankruptcy arena. . . know this and are aware that deadlines are important and should not be heard to complain of unfairness except

> under the most egregious circumstances.

Matter of Robintech, Inc., 863 F.2d 393, 397-98 (5th Cir.), cert. denied, sub nom. Bullock v. Oppenheim, Appel, Dixon & Co., ___ U.S. __ [110 S. Ct. 55] (1989) (citations omitted). Nevertheless, this Court believes that the Court of Appeals, if and when confronted with this issue, will require the lower courts to read the "excusable neglect" rule more liberally than the "beyond-reasonable-control" reading.

This Court believes that the five factors listed in In re Dix, 95 Bankr. 134, ___ (B.A.P. 9th Cir. 1988) (citation omitted), are applied appropriately in cases like this to determine whether a creditor has satisfied the Bankruptcy Rule 9006(b) requirement of a showing of

excusable neglect:

(1) whether granting the delay will prejudice the debtor;

(2) the length of the delay and its impact on efficient court administration;

(3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;

(4) whether the creditor acted in good faith; and

(5) whether clients should be penalized for their counsel's mistake or neglect.

In addition, following INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 3970400 (6th Cir.), cert. denied, sub nom. Garratt v. INVST Financial Group, Inc., 484 U.S. 927

(1987), and In re Winner Corporation, 632 F.2d 658, 660-61 (6th Cir. 1980), the Bankruptcy Court in applying Bankruptcy Rule 9006(b) should find whether a failure to file a proof of claim on or before a bar date resulted from negligence, indifference or culpable conduct on the part of a moving creditor or its counsel.

This Court will therefore remand this case to the Bankruptcy Court for reconsideration of the appellants' motion against these factors. It will be unnecessary for the Bankruptcy Court to make findings of fact concerning the length of the appellants' delay, whether the delay was beyond the reasonable control of the person whose duty it was to perform, whether the appellants should be penalized for their counsel's mistake or neglect, and whether the failure to file proofs of claim on or before the bar date resulted from

negligence, since the Bankruptcy Court's findings of fact in Judge Stair's memorandum opinion address these issues either explicitly or implicitly. Furthermore, it will be for the Bankruptcy Court to determine how to weigh the relative importance of the various factors in this particular case and in other cases, since the determination of the presence or absence of excusable neglect under Bankruptcy Rule 9006(b) must be made case by case.

This disposition of this appeal makes it unnecessary or at least premature to decide whether Judge Stair abused his discretion in denying the appellants' motion. Since it is possible that reconsideration of the motion will lead to the granting of some or all of the relief sought, this Court will not address the due process issue raised by Ft. Oglethorpe,

in light of the familiar rule concerning the avoidance of constitutional issues not necessary to a judicial decision. Once the Bankruptcy Court has reconsidered the appellants' motion under the criteria stated in this opinion, the parties will have an opportunity to appeal again to this Court. However, the Court cautions the parties and their counsel that, the legal issues having been decided, any decision by the Bankruptcy Court to grant or to deny the appellants' motion will stand unless an abuse of discretion is shown. In re Vertientes, Ltd., 845 F.2d 57, 59 (3rd Cir. 1988). "Whether or not to extend a bar date is a matter within the sound

discretion of the bankruptcy court and such a decision will not be set aside absent an abuse of discretion." In re Dix, 95 Bankr. 134, ___ (B.A.P. 9th Cir. 1988) (citations omitted).

ENTER:

Leon Jordan

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
FEB 20,1990

In re PIONEER INVESTMENT SERVICES COMPANY, Debtor.	)
BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP. et al., Appellants,	)
v.	)
	No. CIV 3-85-0927
PIONEER INVESTMENT SERVICES COMPANY, Appellee.	)

O R D E R

For the reasons stated in the Court's Memorandum Opinion filed simultaneously with this Order, the decision of the United States Bankruptcy

Court for the Eastern District of Tennessee denying the appellants' motion for an extension of time within which to file their proofs of claim in this case in bankruptcy is AFFIRMED IN PART and DENIED IN PART. These proceedings are REMANDED to the Bankruptcy Court for reconsideration of the appellants' motion in accordance with the instructions stated in this Court's Memorandum Opinion.

ENTER:

Leon Jordan
United States District Judge

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

In re

Case No, 3-89-01058

PIONEER INVESTMENT SERVICES
COMPANY a/k/a PREMIERE
RESTAURANT INVESTMENT COMPANY

Debtor

MEMORANDUM ON MOTION TO EXTEND TIME TO
FILE PROOFS OF CLAIM OR TO ALLOW FILING
OF PROOFS OF CLAIM NUNC PRO TUNC

APPEARANCES: Milgrim, Thomajon & Lee, P.C.
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Partnership, West Knoxville
Associates Limited
Partnership, Brunswick
Associates Limited
Partnership, and Ft.
Oglethorpe Associates Limited
Partnership

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Knoxville, TN 37901
Attorneys for Committee of
Unsecured Creditors

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The court has before it a motion filed August 23, 1989, by four unsecured creditors, Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership (Clinton, West Knoxville, Brunswick, and Ft. Oglethorpe or, collectively, the Partnerships). By their motion, the Partnerships seek an order extending the bar date for filing proofs of Claim. Alternatively, the Partnerships request the court to allow the filing of their claims nunc pro tunc as of the claims bar date. The debtor opposes the relief sought by the Partnerships. The committee of unsecured creditors advised the court by a letter from its counsel received September 19, 1989, that it takes no position on the motion.

In its resolution of the issues, the court has considered supporting affidavits filed by the Partnerships together with oral testimony introduced at a hearing held September 14, 1989.[1] Additionally, the Court takes judicial notice of material facts of record in the debtor's bankruptcy case file.

This is a core proceeding. 28 U.S.C.A. ss 157(b)(2)(A) and (O) (West Supp. 1989).

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[1] Fed. R. Civ. P. 43, incorporated into ed. R. Bankr. P. 9017, provides in material part:

> (e) Evidence on Motions. When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

The debtor filed its voluntary petition under Chapter 11 of title 11 of the United States Code on April 12, 1989. Contemporaneously therewith it filed a list of its twenty largest unsecured creditors. Included within this list are Clinton, West Knoxville, and Brunswick. The debtor requested and was granted extensions through May 17, 1989, within which to file its statement of affairs and schedules.

On April 13, 1989, a Notice For Meeting Of Creditors (Notice) was mailed by the clerk's office to parties in interest fixing My 5, 1989, as the date for the creditors' meeting required under Bankruptcy ss 341(a). This Notice also fixed August 3, 1989, as the bar date for filing proofs of claim. Concerning the

claims bar date, the Notice provides:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 USC Sec 1111 Bankruptcy rule 3003.
> Bar date is August 3, 1989.

Mark A. Berlin, president of Robriste Enterprises, Inc., general partner of Clinton, West Knoxville and Brunswick, and president of Pudding Enterprises, Inc., general partner of Ft. Oglethorpe, received and read the April 13, 1989 Notice.[2] The

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[2] Mr. Berlin is engaged in the business of real estate and financial management. He is an attorney licensed to practice in Florida and New York and is

Partnerships do not dispute the timely receipt of the Notice by Mr. Berlin nor do they dispute that Clinton, West Knoxville, and Brunswick had notice of the filing of the debtor's Chapter 11 petition. Ft. Oglethorpe, however, contends that it did not receive the April 13, 1989 Notice and that it did not, therefore, have notice of the August 3, 1989 claims bar date.

Mr. Berlin attended and participated in the May 5, 1989 meeting of creditors.[3]

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also a certified public accountant. He testified that he read the Notice upon receipt, but that he has no familiarity with bankruptcy law.

[3] The record is unclear as to whether the May 5, 1989 meeting of creditors was ever held. A "Notice of Rescheduling Of Meeting Of Creditors" dated May 3, 1989, was filed by the debtor's attorneys on May 5, 1989. This notice reflects a rescheduling of the May 5 meeting to May

He also attended adjourned meetings of creditors held May 19 and June 16, 1989. The Proceeding Memo filed by the United

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19, 1989. However, Mr. Berlin in an affidavit accompanying the Partnerships' motion states:

> I attended the first scheduled 341(a) meeting in Knoxville on May 5. I participated in the examination of the debtor and noted for the record, along with the U.S. Trustee, the futility of continuing the Debtor's examination in light of the incompleteness of the debtor's schedules and statement of affairs.... The Section 341(a) meeting was adjourned by the U.S. trustee until June 16, 1989.

Although the United States Trustee did not file a Proceeding Memo evidencing the conduct of a meeting of creditors on may 5, 1989, the court concludes from Mr. Berlin's affidavit that a meeting was held.

States Trustee subsequent to the May 19, 1989 creditors meeting evidences that Mr. Berlin entered an appearance in behalf of each of the Partnerships. The June 16, 1989 adjourned meeting was attended by Mr. Berlin and the Partnerships' attorney, Marc Richards.[4]

The debtor filed its statement of financial affairs and schedules on May 18, 1989. The Partnerships are not listed on the schedules as originally filed. However,

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[4] According to the Proceeding Memo filed by the United States Trustee, Mr. Richards' appearance at the June 16, 1989 adjourned meeting was entered on behalf of Clinton. Mr. Richards also filed a written "Notice of Appearance And Request To Receive Notices" with the clerk's office on June 19, 1989, confirming his representation of Clinton. Affidavits filed by Berlin and Richards evidence Richards' representation of all four Partnerships.

on May 25, 1989, the debtor amended its schedules to include Clinton, West Knoxville, and Brunswick as creditors holding contingent, unliquidated, and disputed claims. Ft. Oglethorpe is not scheduled as a creditor.

The debtor 's schedules, as amended, list fifteen secured creditors holding claims undisputed in amount $34,290,078.26. Two secured creditors, Paul D. Powsner and Banque Worms, are scheduled as holding contingent, unliquidated, and disputed claims. The debtor does not assign amounts to these disputed claims. Paul D. Powsner filed a claim on Hay 16, 1989, in the amount of $609,000.

The debtor scheduled eighty-two Creditors holding priority and general unsecured claims totalling $9,512,903.89. Twenty-two of these creditors are scheduled

as holding priority claims totalling $508,827.43; sixty creditors are scheduled as holding general unsecured claims totalling $9,004,076.46. Claims of five of the general unsecured creditors, including Clinton, West Knoxville and Brunswick, are unscheduled as to amount and are scheduled by the debtor as contingent, unliquidated, and disputed. Circuit City Stores, Inc., a creditor scheduled as holding a disputed claim, filed a proof of claim on August 2, 1989, in the amount of $2,300,000.

On June 5, 1989, the United States Trustee filed his "Appointment of Committee of Unsecured Creditors" designating, inter alia, Clinton as a member of the creditors' committee. Mr. Berlin, representing Clinton, has served as a member of this committee since its inception.

The Partnerships retained the legal

services of Marc Richards, an experienced bankruptcy practitioner,[5] prior to the June 16, 1989 adjourned meeting of Creditors. Concerning Richards' retention, Mr. Berlin, in his affidavit, states:

> [T]he Partnerships retained Mr. Richards as bankruptcy counsel in mid-June, 1989. At that time, I had [the] Partnerships' bankruptcy file reproduced and given to Mr. Richards. I also inquired as to the timing for filing the Partnerships' proofs of claim. Richards advised me that as there was no bar date, that the filing of the Partnerships' proofs of claim was not a matter of urgency.

Mr. Berlin's testimony at the September 14, 1989 hearing on the Partnerships' motion is consistent with his affidavit and is not disputed by Mr. Richards.

On August 23, 1989, twenty days after expiration of the August 3, 1989 claims bar date, the Partnerships filed their proofs of claim. These claims are signed on behalf of Clinton, West Knoxville, and Brunswick by "Mark A. Berlin, President Robriste Enterprises, Inc. (General Partner)." The claim filed on behalf of Ft. Oglethorpe is signed by "Mark A. Berlin, President Pudding

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[5] Mr. Richards states in his affidavit that he has practiced bankruptcy law for more than seven years and that "I have participated in some of the larger bankruptcy cases across the country including: Baldwin-United, LTV, Braniff Airlines, Tacoma Boat Building, Family Health Plans a/k/a Mexicare Health Plans, DRW Realty, Wilson Foods and Spector Red Ball."

Enterprises, Incorporated (General Partner)." The claims are filed in the following amounts: Clinton - $1,567,650; Brunswick - $2,364,330; West Knoxville - $2,280,831; and Ft. Oglethorpe - $730,322.

The Partnerships acknowledge that their claims were filed beyond the August 3, 1989 bar date. They contend, however, that the bar date should be extended or, alternatively, that their claims filed August 23, 989, should be allowed nunc pro tunc to August 3, 1989.

II

Bankruptcy Code 1111(a) provides:

(a) A proof of claim or

interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

11 U.S.C.A ss 1111(a) (West 1979).

Bankruptcy Rule 3003(c) provides in material part:

(c) Filing proof of claim

. . . .

(2) Who must file. - Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest

within the time prescribed by subdivision (c)(3) of this rule: any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) Time for filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

Fed. R. Bankr. P. 3003(c).

Bankruptcy Rule 3003(c)(2) mandates the filing of proofs of claim by creditors scheduled by the debtor as holding "disputed, contingent or unliquidated" claims. Rule 3003(c)(3) directs the court to fix a bar date for filing claims, but permits the court to extend the bar date

for "cause shown".

Bankruptcy Rule 3003(c)(3) must be read in conjunction with Bankruptcy Rule 9006(b). Vertientes, Ltd. v. Internor Trade, Inc. (In re Vertientes, Ltd.), 845 F.2d 57,60 (3rd Cir. 1988); Biscayne 21 Condominium Assoc., Inc. v. South Atlantic Financial Corp. (In re South Atlantic Financial Corp.), 767 F.2d 814,817 (11th Cir. 1985); Dix v. Johnson (In re Dix), 95 B.R. 134, 137 (9th Cir. BAP 1988).

Bankruptcy Rule 9006(b)(1) provides:

(b) Enlargement

(1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by

these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1) (emphasis added).

Paragraphs (2) and (3) of Rule 9006(b) refer to Rules under which the court has no discretion to extend time or

can extend it only within the limits imposed in those Rules. Rule 3003 is not within the exceptions provided in these paragraphs. " [U]nder Rule 9006(b)(1) a bankruptcy court does have discretion to extend time to file a proof of claim, but only under the circumstances set forth in the two situations described in the Rule." In re Vertientes, Ltd., 845 F.2d at 59.

The term "excusable neglect" is not defined in the Bankruptcy Code. In In re South Atlantic Financial Corp., the Eleventh Circuit stated:

> Courts have interpreted "excusable neglect" under Rule 9006(b) and its identically worded predecessor, Rule 906(b), as requiring the movant to show that "'the failure to timely perform a duty was due to circumstances

which were beyond the reasonable Control of the person whose duty it was to perform.'" In re Gem Rail Corp., 12 B.R. 929, 931 (Bankr. E.D. Pa. 1981) (quoting In re Manning, 4 B.C.D. 304, 305 (D. Conn. 1978). Thus, in In re Underground Utility Construction Co., 35 B.R. 588 (Bankr. S.D. Fla. 1983), the court held that a creditor had failed to show "excusable neglect" for filing his claim three days after the bar date where the untimely filing was the result of his failure to mail his claim to the proper address. Similarly, in In re Oakton Beach and Tennis Club Real Estate Limited Partnership, 9 B.R. 201 (Bankr.E.D. Wisc. 1981), the court held that counsel's reliance on misinformation from a bankruptcy

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court clerk regarding his duty to file a proof of claim did not amount to excusable neglect; see also In re Horn Construction a& Maintenance, Inc., 32 B.R. 87 (Bankr. S.D. Ala. 1983, ("misunderstanding" between a creditor and its lawyers which caused its late filing of a proof of claim did not amount to "excusable neglect.") In re Gem Rail Corp., 12 B.R. 929,931 (Bankr. E.D. Pa. 1981) (creditor's failure to file timely proof of claim was not excusable neglect where there was no showing by creditor that records could not easily have been obtained). Courts have been most willing to find excusable neglect where the movant failed to comply with the bar date because, through no fault

of its own, it had no notice of that date. See e.g., In re Loveridge, 2 B.C.D. 1957 (Bankr. D. Conn. 1977).

767 F.2d at 817-818.

The Sixth Circuit has not construed "excusable neglect" under Bankruptcy Rule 9006(b),[6] It has, however, in commenting on Fed. R. Civ. P. 6(b), upon which Rule

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[6] In a case construing Bankruptcy Rule 906(b), the predecessor to Rule 9006 (b), the Sixth Circuit found that "[n]on-receipt [of a notice of the claims bar date by the creditor or his attorney] is sufficient ground for excusable neglect." Bratton v. The Yoder Co. In re Yoder Co.), 758 F.2d 1114, 1121 (6th Cir. 1985) the facts of In re Yoder are clearly inapposite to those confronting the court in the instant proceeding.

9006(b) is patterned, observed:[7]

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[7] Fed. R. Civ. P. 6(b) provides:

Rule 6. Time

(b) Enlargement. When by these rules or by a notice given hereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

Rule 6(b)(2) has remained substantially unchanged since 1946.

> [Rule 6(b)(2)] would seem to be designed to afford relief to a party whose failure to take timely required steps might be properly classified as "excusable neglect."

Anderson v. Yungkau, 153 F.2d 685, 687 (6th Cir. 1946), aff'd 67 S.Ct. 428 (1947).

District Judge Neese of this district, in denying a late-filed motion by a plaintiff seeking additional time to respond to a motion for summary judgement, stated:

> The plaintiff was required to have submitted any response to the defendant's motion within 5 days after the service thereof. Local Rule 12(b). He could have obtained readily an enlargement of

> this period had he sought the same within the 5-day period, Rule 6(b)(1), Federal Rules of Civil Procedure; however, because of his failure to do so, this Court can only grant an extension of time within which to respond to the defendant's motion upon a showing of excusable neglect. Rule 6(b)(2), Federal Rules of Civil Procedure.... "[Counsel] should not expect an application under Rule 6(b)(2) to be granted when failure to act was due to simple inadvertence or a mistake regarding the content of the rules or unfamiliarity with them ...." 4 Wright & Miller, Federal Practice and Procedure 622, ss 1165.

Sherrod v. Piedmont Aviation, Inc., 516 F.Supp. 39, 41 n.1 (E.D. Tenn. 1978)

(emphasis added).

Bankruptcy Judge Speer, commenting on excusable neglect within the context of former Bankruptcy Rule 906(b), observed:

> Under this rule, the Court may, at its discretion, permit a party to perform an act subsequent to the specified term in which it must otherwise be done if the party can show that the failure to do the act within the time was the result of excuseable [sic] neglect. Although the determination as to whether or not excuseable [sic] neglect is present must be made on a case-by-case basis, it is generally held that if the delay resulted from factors which were within the control of the delinquent party, then the failure is not the result of excuseable [sic] neglect. Beneficial Finance Company of Hartford v. Manning (Matter of Manning), 4 B.C.D. 304 (Bkcy. D. Conn. 1978), In re Grethen, 14 B.R. 221 (Bkcy. N.D. Iowa 1981).

In re Schotz, 57 B.R. 259, 261-62 (Bankr. N.D. Ohio 1986).

Clinton, West Knoxville, and Brunswick acknowledge receipt of the April 13, 1989 notice in ample time to file claims prior to the August 3, 1989 bar date. Further, Marc Richards, counsel for the Partnerships, and Mark Berlin attended Creditors' meetings held far in advance of the bar date. Mr. Berlin testified that the Partnerships relied upon Counsel to protect their interests; that counsel was

provided a copy of the Partnership' bankruptcy file; and that counsel advised him that the filing of claims was "not a matter of urgency." Mr. Berlin, an attorney and certified public accountant, is an experienced businessman and Mr. Richards is an experienced bankruptcy attorney. This court, on the record before it, cannot find that the failure of Clinton, West Knoxville, and Brunswick to file claims prior to expiration of the bar date was "due to circumstances . . . beyond [their] reasonable control." In re South Atlantic Financial Corp., 767 F.2d at 817 (quoting In re Manning, 4 B.C.D. 304, 305 (D. Conn. 1978)).

Ft. Oglethorpe cannot successfully contend it did not also receive notice of the debtor's Chapter 11 case in time to permit it to file a claim. Mr. Berlin received the April 13, 1989 Notice. He

cannot close his eyes to the fact that he is also president of Pudding Enterprises, Inc. , general partner of Ft. Oglethorpe. More conclusively, Mr. Berlin appeared on behalf of Ft. Oglethorpe at the adjourned meeting of creditors held May 19, 1989, and employed counsel to represent it in mid-June, 1989. Ft. Oglethorpe's failure to timely file a proof of claim is not excused by the fact that a separate Notice addressed to it was not received by Mr. Berlin. See In re Terex Corp., 45 B.R. 290, 293 (Bankr. N.D. Ohio 1985) (widow who received notice individually deemed also to have received notice in capacity as executrix of deceased husband's estate).

The Partnerships have not established that their failure to timely file proofs of claim is the result of "excusable neglect" under Bankruptcy Rule

9006(b)(1).

III

The Partnerships urge the court to grant their motion on general grounds of equity. They aver that an extension of the bar date will in no way prejudice the debtor; that such an extension will not adversely affect the administration of the estate; that there are irregularities in the debtor's schedules; that the delay in filing the Partnerships' proofs of Claim was occasioned in part by counsel's withdrawal from his prior law firm;[8] and

[8] Marc Richards, in his affidavit, states that he was employed by the law firm of Myerson & Kuhn until July 31, 1989; that he and three other partners and associates of Myerson & Kuhn resigned from that firm

that the Partnerships have participated in the debtor's Chapter 11 case since its inception.

This court is aware that some courts have examined the prejudicial effect of a late filing in determining the existence of "excusable neglect." See e.g., In re Four Seasons Security Laws Litigation 493 F.2d 1288, 1290-91 (10th Cir. 1974) (construing excusable neglect under Fed. R. Civ. P. 6(b)(2)); Dix v. Johnson (In re Dix), 95 B.R. 134, 138 (9th Cir. BAP 1988) (applying a liberal definition of excusable neglect under Bankruptcy Rule 9006(b)(1) which

because of disputes and differences with the remaining partners; that from mid-July through the end of the month his attention was largely diverted in seeking to negotiate an amicable withdrawal from Myerson & Kuhn; and that prior to and after his resignation he was unable to obtain access to the Partnerships' files.

factors in equitable considerations); In re O.P.M. Leasing Services, Inc., 35 B.R. 854, 866 (Bankr. S.D.N.Y. 1983) (construing excusable neglect under Bankruptcy Rule 9006(b)(1)). This court, however, is persuaded that the better authority is established in opinions out of the United States Courts of Appeal for the Third, Fourth and Eleventh Circuits.

The Third Circuit in In re Vertientes, Ltd., stated:

> [U]nder Rule 9006(b)(1), a bankruptcy court does have discretion to extend time to file a proof of claim, but only under the circumstances set forth in the two situations described in the Rule.
>
> . . . .

> Rule 3003(c)(3) must be read in conjunction with Rule 9006(b). Under these Rules, the bankruptcy court's discretion to extend time is limited to two situations -- requesets [sic] made before the expiration of the originally prescribed time limitation, and where failure to act was due to excusable neglect. The court has no discretion to grant an extension simply because no prejudice would result, or for any other equitable reason.

845 F.2d at 59-60 (citations omitted (emphasis added).

The Eleventh Circuit is in accord

that the focus of "excusable neglect" under Bankruptcy Rule 9006(b)(1) "is on the movant's actions and the reasons for those actions, not on the effect that the extension might have on the other parties' positions." In re South Atlantic Financial Corp., 767 F.2d at 819.

The Sixth Circuit in Anderson and Judge Neese in Sherrod, supra, discuss "excusable neglect" under Fed. R. Civ. P. 6(b) within the context of the moving parties' "failure to act". There is no hint that either court was willing to go beyond the clear language of the Rule to consider factors other than the movant's actions. For this court to grant the Partnerships' motion, it would need to ignore the language of Rule 9006(b)(1) which authorizes an extension of time "on motion made after the expiration of the specified period ... where the failure to

act was the result of excusable neglect." (emphasis added).

The court believes the construction afforded Bankruptcy Rule 9006(b)(1) by the Third, Fourth, and Eleventh Circuits to be logically consistent with the plain meaning of the Rule. It further believes the Sixth Circuit's statements in Anderson and the district court's statements in Sherrod compel a similar construction of Rule 9006(b)(1) by this Court.

Notwithstanding that this court's sympathies may lie with the Partnerships, it cannot judicially expand Rule 9006(b)(1) to add a ground for extending the time to perform an act within a specified period based upon general equitable considerations. The United States Supreme Court recently stated that "whatever equitable powers remain in the bankruptcy

courts must and can only be exercised within the confines of the Bankruptcy Code." Norwest Bank Worthington v. Ahlers, 485 U.S. 197, ____ 108 S.Ct. 963, 968-9, 99 L.Ed.2d 169, 179 (1988). This court is bound by this principle.

For the reasons set forth herein, the court cannot extend the bar date for filing proofs of claim by the Partnerships nor can it enter an order allowing the filing of the Partnerships' claims nunc pro tunc to the August 3, 1989 claims bar date. The Partnerships' motion will be denied.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052. An appropriate order will be entered.

FILED: October 10, 1989.

BY THE COURT

RICHARD STAIR, JR.
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 3-89-01058

PIONEER INVESTMENT SERVICES
COMPANY a/k/a PREMIERE
RESTAURANT INVESTMENT COMPANY

Debtor

O R D E R

For the reasons set forth in the "Memorandum On Motion To Extend Time To File Proofs Of Claim Or To Allow Filing Of Proofs Of Claim Nunc Pro Tunc" filed this date, the motion filed August 23, 1989, by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership seeking an extension of time to file proofs of claim or,

alternatively, to allow the filing of proofs of claim nunc pro tunc, is DENIED.

SO ORDERED.

ENTER: October 10, 1989

BY THE COURT

RICHARD STAIR, JR.
United States Bankruptcy Judge

APPENDIX F

No. 90-6339

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
OCT 28, 1991
LEONARD GREEN, CLERK

IN RE: PIONEER INVESTMENT SERVICES COMPANY, Debtor ---------- BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, ET AL., Plaintiffs-Appellants, v. PIONEER INVESTMENT SERVICES COMPANY Defendant-Appellee.	)	ORDER

BEFORE: JONES and NORRIS, Circuit Judges; and JOINER,* Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition

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* Hon. Charles W. Joiner sitting by designation from the Eastern District of Michigan

having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk